TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1226.~~ ~~844~~ ~~831~~ 172

THE WINONA AND ST. PETER RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE TOWN OF ELGIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED OCTOBER 8, 1888.

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1 STATE OF MINNESOTA, *ss:*

In obedience to the command of the accompanying writ of error, issued in the action between The Town of Elgin, plaintiff, and The Winona and St. Peter Railroad Company, defendant, I, clerk of the supreme court of the State of Minnesota, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled action between The Town of Elgin, plaintiff, against The Winona and St. Peter Railroad Company, defendant, with all things concerning the same.

In witness whereof I have hereto subscribed my name and affixed the seal of said supreme court of the State of Minnesota, at the office of the clerk of said court, in the city of St. Paul, Minnesota, this 2nd day of October, A. D. 1888.

[Seal of the Supreme Court, State of Minnesota.]

J. D. JONES,
Clerk Sup. Court Minn.

Be it remembered that on the 7th day of November, 1887, there was filed in the office of the clerk of the supreme court of the State of Minnesota a return to said supreme court from the district court of Minnesota in and for the county of Wabasha in words and figures following, to wit:

2 STATE OF MINNESOTA, } *ss:*
County of Wabasha, }

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, of which a copy is hereto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at the office of Kellogg & Eaton, in the city of Rochester, in Olmsted county, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will have the amount it is entitled to recover ascertained by the court or under its direction and take judgment for the amount so ascertained, together with the costs and disbursements of this action.

Dated Sept. 16th, 1884.

C. K. DAVIS &
KELLOGG & EATON,
Plaintiff's Attorneys, Rochester, Minn.

Filed June 26th, 1885.

CHAS. J. STAUFF, *Clerk.*

3 *Complaint.*

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA AND ST. PETER RAILROAD CO., Defendant.

The complaint of the plaintiff respectfully alleges and shows to this court—

That the plaintiff is and for ten years last past has been a town and municipal corporation duly created and organized under and by virtue of the laws of the State of Minnesota; that during the years eighteen hundred and seventy-eight and eighteen hundred and seventy-nine D. F. Ferguson was the duly elected and qualified chairman of the board of supervisors of the said town, and D. J. Wood and Ferdinand Hample were duly elected and qualified supervisors thereof, and B. H. Gould was the duly elected and qualified town clerk thereof.

4 That the Plainview Railroad Company is and during all the times hereinafter stated was a corporation duly created and organized under and by virtue of the laws of the State of Minnesota, with power to build the railroad hereinafter mentioned, and that the defendant, The Winona & St. Peter Railroad Company, was during all the times hereinafter stated and now is a corporation duly created and organized under and by virtue of the laws of the State of Minnesota.

That on January 22d, A. D. 1878, the said Plainview Railroad Company made and delivered to the town clerk of the town of Elgin a proposition in writing, signed by the president and secretary of said company, containing all the statements and specifications required by section four (4) of chapter one hundred and six (106) of the general laws of eighteen hundred and seventy-seven and stating the amount of bonds of said town desired to be forty thousand ($40 000) dollars, and said town clerk immediately endorsed on said proposition the date of filing, and the same was thereupon transcribed into the records of his office, a copy of which proposition is hereto attached, marked Exhibit "A," and made a part of this complaint.

That thereafter and on the 22d day of January, 1878, the Plainview Railroad Company posted up in three public places in said town notice that after a day certain named in said notice, to wit, after January 29th, 1878, a petition to the supervisors of said town, appended to a copy of said proposition, would be presented to the resident tax-payers of the said town of Elgin, asking the said supervisors to agree to the said proposition filed with the town clerk as aforesaid. A true copy of said notice is hereto attached,

5 marked Exhibit "B," and to which notice was appended a

copy of Exhibit "A," which said notice was the only notice ever given in relation to said matter.

That thereafter and within four months after filing said proposition with said town clerk, to wit, on the March 28th, 1878, said railroad company delivered to said town clerk six petitions, in the form required by section seven of said act; which said several petitions were in the following form, except the names appended thereto, which are herein omitted:

Petition.

"To the town board of supervisors of the town of Elgin, in the county of Wabasha and State of Minnesota:

"We whose names are hereto subscribed, being residents of said town, and who are assessed for taxes upon real or personal estate in said town, as shown by the last assessment roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company, to which this petition is appended.

"Dated 30th day of January, 1878."

To each of which said petitions was attached a copy of the proposition made by the Plainview Railroad Company, being Exhibit "A," hereto attached.

That after said January 30th, and between that date and March 28th, 1878, the said Plainview Railroad Company, by its agents and representatives, presented the said petitions to certain resident taxpayers of said town for their signatures, and said petitions were signed by many persons residing in said town who were assessed for taxes upon real or personal estate in said town, as shown by the then last assessment roll of said town, but the plaintiff alleges that
6 said petition or petitions were not signed by, and when filed with the town clerk of said town did not in the aggregate bear the names of a majority of the persons residing in said town so assessed for taxes.

That many of the persons whose names were appended to said petitions were not electors or legal voters in said town, or at all; that some were women, some were minors, some copartnerships, and some were aliens who had not declared their intention to become citizens of the United States and were subjects of a foreign country, and that said petition or petitions were not signed by a majority of the electors or legal voters of said town.

That all the signatures on said petitions were duly verified as provided by said section seven, to wit, by persons witnessing said signatures.

That said petitions, so signed as aforesaid and having appended thereto copies of said proposition, were filed in the office of the town clerk of the town of Elgin on March 28th, 1878.

That the aforesaid petitions were the only petitions presented to said town clerk and the only ones ever made touching said matters or asking the authorities of said town to agree to the proposition of

said railroad company, and that said petitions and said section seven of said act constituted the only authority had or claimed for the issue of the bonds hereinafter set forth.

That no election was ever held in said town to authorize the supervisors to agree to said proposition or to authorize the issue of any bonds of said town, or in relation to said matter in any manner whatever.

7 That thereafter and on March 28th, 1878, the said board of supervisors of said town of Elgin, pretending and claiming to act and acting under and by virtue of the foregoing petitions, propositions, and proceedings, but in truth and in fact without any authority or right whatever, did adopt and did place on file in the office of the town clerk of said town a resolution, a copy of which is hereto attached, marked Exhibit "C," and made a part hereof.

That said supervisors had no authority to pass said resolution or to bind the town of Elgin thereby or to waive the issue of said stock to said town, as therein adopted, and that said resolution was null and void; that no proceedings except as hereinbefore set forth had ever been taken by the electors of said town, or any proceedings or acts whatever to authorize the passing of said resolution.

8 That, pretending to rely upon the various acts and proceedings herein set forth, the said railroad company constructed its railroad and had the cars running thereon as and performed the several acts on its part as in said proposition stated, except that said railroad company never issued to the said town of Elgin any stock of the said company or tendered or ever offered to issue the same.

That after the foregoing proceedings and after the said road had been so built, and on November 16th, A. D. 1878, the said board of supervisors of the said town, at the instance and request of said railroad company, wrongfully and unlawfully passed a resolution and placed the same on file in the town clerk's office of said town, a copy of which is hereto attached, marked Exhibit "D," and made a part hereof.

That no authority had ever been given by the electors of said town or by said town or by any proceedings or acts to authorize said supervisors to pass said resolution, except the foregoing proceedings and acts, and the said supervisors and the said railroad company well knew when the same was passed and when resolution, Exhibit "C," was passed that a majority of the persons residing in said town of Elgin who were assessed for taxes on real or personal estate, as shown by the then last assessment roll of said town, had not signed (as in fact they had not signed) said petition or petitions, and they had no authority to pass the same or to bind the town thereby or to issue the bonds as therein stated, all of which they well knew.

9 That thereafter and on January 1st, 1879, the said D. F. Ferguson, chairman of said board of supervisors, and B. H. Gould, said town clerk, pretending to act under and by virtue of the foregoing proceedings, acts, and resolutions and said section seven of said law, but in truth and in fact, as they well knew, without any authority whatever, wrongfully and unlawfully issued

and delivered to the Plainview Railroad Company certain negotiable bonds and interest coupons thereto attached, hereinafter more particularly described. Said bonds were eighty in number, pretending to be the bonds of the town of Elgin, which said bonds were numbered from one to eighty, consecutively.

That each of said bonds purports to be on its face the bond of the town of Elgin, and all payable to the Plainview Railroad Company or to the bearer, and are for five hundred ($500) dollars each, amounting to the sum of forty thousand ($40,000) dollars. A copy of one of said bonds, all of which are alike, is hereto attached and marked Exhibit "E," and made a part hereof.

That said bonds were dated January 1st, 1879, payable in twenty years from the date thereof, bearing interest at seven per cent. per annum, payable annually according to the conditions of twenty certain interest coupons attached to each of said bonds and numbered corresponding to the number of said bonds, one payable January 1st, 1880, and one January 1st of each year thereafter for twenty years. A copy of one of said coupons is hereto attached, marked Exhibit "F," and made a part hereof; all of which, except the date of payment and the number of the bond, are in the same words and figures, which coupons were also signed by said Ferguson and Gould, as such officers.

10 That said officers had not been authorized by said town or by any vote of the electors or legal voters thereof or by any law of the State of Minnesota to issue said bonds and coupons or by any acts or proceedings whatever, except the pretended acts and proceedings herein set forth, all of which they well knew at said time, and that said bonds and coupons were executed and delivered by said town Rail- to said railroad company without any consideration whatever. lease- That said railroad company wrongfully and unlawfully received road bonds and coupons, well knowing that it has no authority to com- receive the same, and well knowing all the foregoing facts, acts, and ch- proceedings herein set forth, and well knowing that said officers had a- not been authorized by said town or the electors or legal voters thereof to issue said bonds and coupons.

That said railroad company, knowing the invalidity of said bonds and coupons and having knowledge of all the foregoing facts, acts, and proceedings herein set forth, on or about July 9th, 1879, wrongfully and unlawfully, intending to injure and defraud said town and deprive it of any defense to said bonds or coupons as against any *bona fide* holder, for value thereof, sold, transferred, and delivered said bonds and coupons to citizens of the State of Wisconsin residing beyond the jurisdiction of this court; that said bonds and coupons were negotiable, and said parties purchased the same of said railroad company *bona fide* in good faith without notice of any of the foregoing facts invalidating the said bonds, and paid the railroad company therefor the full face value thereof, to wit,

11 forty thousand dollars, and the said bonds and coupons are now held and owned by citizens of the State of Wisconsin.

That by, through, and under such transfer said bonds and coupons were purchased and acquired by Samuel Marshall and Charles F.

Ilsley, residents and citizens of the State of Wisconsin, who purchased said bonds and coupons in good faith before maturity and for value without notice of any of the facts invalidating them.

That thereafter and on or about the 29th day of January, 1881, the said Samuel Marshall and Charles F. Ilsley, who were then citizens of the State of Wisconsin, commenced an action at law in the United States circuit court for the district of Minnesota against the Town of Elgin, and that said court then and there obtained and had jurisdiction of the said action and of the parties thereto.

That said suit was brought to recover the amount of interest due upon forty-five (45) coupons of said bonds falling due January 1st, 1881, and was brought upon said forty-five coupons, the plaintiffs alleging that they were the owners and holders of said bonds and coupons, for value, before maturity, without notice of any of the facts invalidating them.

That the said Town of Elgin defended said action upon the grounds herein set forth in this complaint, setting up all the facts, and such proceedings were thereafter had in said court that said court rendered judgment upon the said issues in favor of said plaintiffs against the Town of Elgin, adjudging, among other things, that the said bonds and coupons had been transferred to said plaintiffs before maturity and that they purchased them for a valuable consideration, in good faith, without notice of any of the facts invali-
12 dating the said bonds, except as appeared upon the face thereof, and that said town would be compelled to pay them, and that as between said innocent purchasers and said town they were a valid obligation against said town, and rendered judgment against said town accordingly for said coupons and for such interest in the sum of sixteen hundred and ninety-six $\frac{85}{100}$ dollars ($1,696.85) damages and costs, which judgment the said town, plaintiff, has satisfied and paid.

That thereafter the said Marshall & Ilsley duly brought in said court, which then and there had and obtained jurisdiction in said case and over the parties thereto, four other suits against said town of Elgin to recover upon certain other coupons of said bonds held and owned by them and interest falling due, which said coupons had become due from year to year according to the terms thereof, to wit: One suit which was commenced on November 1st, 1881; another suit which was commenced February 27th, 1882; another suit which was commenced May 11th, 1883, and another suit which was commenced January 5th, 1884.

That to the suits brought November 1st, 1881, and February 27th, 1882, The Town of Elgin, this plaintiff, interposed substantially the same answers as to the first suit brought against it, but that to the other two suits it made no answer for the reason that it was advised and believed that the question of its liability had become *res adjudicata* in said court.

That said court so proceeded in each of said actions that judgment was rendered in each of said cases in favor of the plaintiffs
13 and against the defendant as follows: In the action commenced November 1st, 1881, for one thousand four hundred

and forty-three $\frac{91}{100}$ ($1,443.91) dollars; in the action commenced February 7th, 1882, for two thousand eight hundred and fifty-two $\frac{85}{100}$ ($2,852.85) dollars; in the action commenced May 11th, 1883, for two thousand seven hundred and forty-five $\frac{12}{100}$ ($2,745.12) dollars, and in the action commenced January 5th, 1884, for three thousand one hundred and seventy-five $\frac{82}{100}$ ($3,175.82) dollars; all of which judgements this plaintiff has heretofore duly paid and satisfied, except the last two, which it will be compelled to pay.

And the plaintiff avers that all of said bonds and coupons having been, as in fact they have been, sold and transferred by said Plainview Railroad Company before maturity and for value to citizens of other States have become, are, and will be in the hands of such transferees or their assigns valid and subsisting obligations against this plaintiff, which this plaintiff will be compelled to pay in full, principal and interest, and was compelled to and did pay to such holders the first year's interest due on said bonds, to wit, the sum of two thousand eight hundred ($2,800) dollars, being for coupons due January 1st, 1880.

That under and by virtue of an act of the Legislature of the State of Minnesota entitled "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railroad Company," approved March 3rd, 1881, the passage of which act was procured by the said Winona & St. Peter Railroad Company and which act after its passage was duly assented to and accepted by it, the Winona & St. Peter Railroad Company was authorized to purchase
14 the stock or to purchase or lease the property or franchise of the Plainview Railroad Company, and the said Plainview Railroad Company was thereby authorized to sell and convey or to lease its property and franchise to the said Winona & St. Peter Railroad Company upon such terms as the boards of directors of said company might agree upon, so as to make the property and franchises of the Plainview Railroad Company a part of the property and franchises of said Winona & St. Peter Railroad Company, to be used and operated by it under its charter.

And it was further provided in and by said act that any such purchase of the property or franchises of the Plainview Railroad Company should be made and all such property held by said Winona & St. Peter Railroad Company subject to all demands, claims, and rights of action against said Plainview Railroad Company arising or growing out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin, and Viola to said Plainview Railroad Company, and in taking such transfer under said act said Winona & St. Peter Railroad Company should assume all claims and demands against said Plainview Railroad Company to the extent and value only of the property and franchises so transferred, which act is hereby referred to for greater certainty.

That the bonds and coupons mentioned in said act are the same bonds and coupons mentioned in this complaint, and that the Winona & St. Peter Railroad Company did under said act issue and dispose

15 of its capital stock to an amount necessary to make and complete the purchase authorized by said act.

That on or about the month of May, A. D. 1881, the said Winona & St. Peter Railroad Company, acting solely under the provisions of said statute, purchased all of the railroad, property, and franchises of the Plainview Railroad Company referred to in said statute, which property and franchises were of the value of two hundred thousand dollars, which said purchase was made under and by virtue of said act and the powers therein granted, and the Winona & St. Peter Railroad Company in making said purchase and as part of the consideration therefor so assumed all claims, demands, and right of action against said Plainview Railroad Company, as in said act provided, including the claim, demand, and right of action herein set forth, and agreed to pay the same.

Wherefore the plaintiff demands judgment against said defendant for the sum of forty thousand dollars, with interest thereon from January 1st, 1879, at seven per cent. per annum, together with the costs and disbursements of this action.

C. K. DAVIS AND
KELLOGG & EATON,
Plaintiff's Attorneys.

EXHIBIT "A."

Proposition.

To the Town of Elgin, in the county of Wabasha and State of Minnesota, and to the town clerk of said town:

16 The Plainview Railroad Company, a corporation existing and organized under the laws of the State of Minnesota, respectfully represents that said company desires aid from the town of Elgin aforesaid in the construction of its railroad, and for the purpose of obtaining such aid under the laws of this State makes and delivers to the town clerk of said town a definite proposition in writing as follows, viz: The amount of bonds desired by said railroad corporation from said town of Elgin, as such aid, is forty thousand dollars, said bonds to be made payable and to mature in twenty years from the date of the same, or, at the option of the said town, to be payable at any time prior to the maturity of the same after the year 1878. Said bonds shall bear interest at the rate of seven per cent. a year, payable, on the first day of January in each year, at the office of the treasurer of the State of Minnesota, and said bonds shall be executed in proper legal form, with interest coupons attached, and shall be delivered to said railroad company whenever and as soon as said railroad company shall have its line of railroad graded, the ties and iron laid thereon, with the cars running thereon from a point of junction with the Winona & St. Peter railroad, in the county of Olmsted, east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview, as the same existed on December 31, 1877, provided the same is so completed during the year A. D. 1878,

and to a depot in said town of Elgin within one hundred rods of the center of section 27, in said town; and the said railroad company will, in consideration of said bonds, at the election of said town, issue to said town shares of its capital stock to the amount of forty
17 thousand dollars; and if not so completed, with the cars running thereon, in the time above specified, then said bonds shall not be issued or delivered to said company and said town shall be free from any obligation to said railroad company.

In testimony whereof the said Plainview Railroad Company have caused these presents to be signed by the president and secretary of said company and sealed with its seal, at the village of Plainview, Minnesota, this twenty-first day of January, A. D. 1878.

[SEAL.] GEORGE W. VAN DUZEN,
President Plainview Railroad Company.
C. H. BLISS,
Secretary Plainview Railroad Company.

EXHIBIT "B."

Notice.

Notice is hereby given that after the 29th day of January, A. D. 1878, a petition to the proper authorities, viz., the town board of supervisors of the town of Elgin, in the county of Wabasha and State of Minnesota, will be presented to the resident tax-payers of said town for their signatures, and asking said board of supervisors, as such authorities of said town, to agree to the proposition, a copy of which is as follows:

EXHIBIT "C."

Resolutions of Town Board.

STATE OF MINNESOTA, } *ss:*
County of Wabasha, Town of Elgin, }

At a meeting of the town board of supervisors of the town
18 of Elgin, in the county of Wabasha and State of Minnesota, held at the office of the town clerk, in Elgin, in said town, on the 28th day of March, A. D. 1878—present, D. F. Ferguson, chairman; Ferdinand Hample and D. J. Wood, supervisors—the following preamble and resolutions were adopted by said board:

Whereas the Plainview Railroad Company, a corporation existing and organized under the laws of the State of Minnesota, did on the 22*st* day of January, A. D. 1878, file with the town clerk of said town of Elgin, in his office, a definite proposition in writing asking aid of the said town, by its bonds, in the sum of forty thousand dollars, to the construction of the railroad of the said company;

And whereas the said Plainview Railroad Company did on the 22*st* day of January, A. D. 1878, post up at three of the public places in said town notice that after a day certain, named in said notice, to wit, after January 29th, A. D. 1878, a petition to the super-

visors of said town, as the proper authorities of said town, appended to a copy of the said proposition, would be presented to the resident tax-payers of said town of Elgin, as shown by the last assessment roll of said town, for their signatures, asking the said supervisors, as the proper authorities of said town, to agree to the said proposition filed with the town clerk as aforesaid, a true copy of said notices, etc., posted, with proof of posting the same, being on file with the town clerk of said town;

And whereas, after the day named in the said notice, a petition, appended to a copy of the said proposition, was presented to the resident tax-payers of said town, as shown by the last assessment roll of said town, for their signatures, and was signed by a large number of said resident tax-payers, as appears by the affidavits of H. G. Richardson, J. Q. Richardson, A. Y. Felton, Ezra Feller, H. C. Woodruff, A. K. Johnson, C. Chanpine, Geo. Bryant, R. A. Jones, and C. T. Benedict, the said petition and signatures
19 thereto and the affidavits thereto and the affidavits to the time of presentation and to the signatures of the persons signing the same being on file in the said town clerk's office;

And whereas it appears from the said petition and signatures thereto and the affidavits attached to the same and from the last assessment roll of said town, certified copies of which we have carefully examined, that a majority of the resident tax-payers of said town of Elgin who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment roll of said town of Elgin, have signed the said petition and request;

And whereas it appears that the construction of the railroad to be constructed by the Plainview Railroad Company, as set forth in the proposition of said company, to and through the said town of Elgin will promote the general prosperity and welfare of the tax-payers of said town of Elgin:

Now, therefore, be it resolved by the board of supervisors of the town of Elgin, in said county, as the proper authorities of said town, That the said proposition of the said Plainview Railroad Company to the said town, asking aid to the construction of said company's railroad by the bonds of said town in the sum of forty thousand dollars, be, and the same is hereby, accepted and agreed to on the part of the said town, so far as the issue of the bonds of said town to said railroad company on the terms and conditions in said proposition stated.

Resolved further, That the bonds of the said town of Elgin to the amount of forty thousand dollars, executed in proper legal form, with interest coupons attached and payable as in the said proposition requested, be, and the same are hereby, authorized and directed to be issued to the said Plainview Railroad Company whenever and as soon as the said company shall have its railroad completed, with the cars running thereon, as specified in the said proposition.

20 Resolved further, That the issue of stock by the said Plainview Railroad Company to the town of Elgin, in said county, in consideration of the bonds of the said town in the amount of forty thousand dollars, be, and the same is hereby, waived, and the

said railroad company be, and hereby is, absolved from any and all obligations to issue the said stock, it being by us adjudged and determined that it will not be to the best interest of said town to accept or receive the said stock, and, on behalf and for said town of Elgin, we, the supervisors of said town, as the proper authorities thereof, do hereby renounce any and all right to the issue of the said stock of the said railroad company, and the reception of said stock is hereby declined and refused.

D. F. FERGUSON.
FERDINAND HAMPLE.
DAVID J. WOOD.

Attest: B. H. GOULD, *Town Clerk.*

EXHIBIT "D."

At a meeting of the board of supervisors of the town of Elgin, held at the office of the clerk of said town on the 16th day of November, A. D. 1878—present, D. F. Ferguson, Ferdinand Hample, and D. J. Wood, supervisors—on motion, the following preamble and resolution was unanimously adopted, to wit:

Whereas the Plainview Railroad Company did, on the 21st day of January, A. D. 1878, make a proposition to the town of Elgin for aid in the construction of its railroad in and by the bonds of said town in the sum of forty thousand dollars, in consideration of which said railroad company undertook and agreed to construct its railroad from the Winona & St. Peter railroad to the village of
21 Plainview, to a depot in the said town of Elgin, within one hundred rods of the center of section twenty-seven, in said town; and whereas said proposition was duly accepted by said town; and whereas said railroad company has complied with the terms of said proposition on its part and has constructed its railroad as agreed and the cars now are running thereon: Therefore,

Resolved, That the town of Elgin forthwith issue to said Plainview Railroad Company its bonds in the sum of forty thousand ($40,000) dollars, to become due on or before twenty years from January 1st, A. D. 1879, with interest thereon, payable annually, at seven per cent. per annum, and the chairman of this board and the town clerk of said town are hereby directed to sign and issue such bonds for said town, and that issue of stock by said Plainview Railroad Company to said town of Elgin be, and is hereby, waived.

D. F. FERGUSON,
FERDINAND HAMPLE,
D. J. WOOD,
Supervisors.

EXHIBIT "E."

No. 3. UNITED STATES OF AMERICA. $500.

STATE OF MINNESOTA, *County of Wabasha, Town of Elgin.*

Know all men by these presents that the Town of Elgin, in the county of Wabasha, State of Minnesota, acknowledges itself indebted to the Plainview Railroad Company, a corporation existing under and by virtue of the laws of the State of Minnesota, in the sum of five hundred dollars ($500), which sum the Town of Elgin
22 hereby promises to pay to the said Plainview Railroad Company, or to the bearer hereof, at the office of the treasurer of the State of Minnesota or at such other place in said State as is or may be designated by law, on or before the first day of January, A. D. 1899, together with interest thereon from the date hereof until such principal sum shall be paid at the rate of seven per cent. per annum, which interest shall be payable annually on the first day of January in each year upon the presentation and surrender of the proper coupon annexed hereto.

This bond is issued in pursuance of a mutual agreement between the said town and the said railroad company, which agreement was made in accordance with the laws of the State of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor signed by a majority of the resident tax-payers of said town, said agreement having been fully performed by said railroad company on its part.

This bond is issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of said town.

In testimony whereof the said Town of Elgin has executed this bond, by the chairman of the town board of supervisors and the town clerk of said town, at Elgin, this first day of January, A. D. 1879.

D. F. FERGUSON,
Chairman of the Town Board of Supervisors of the Town of Elgin, State of Minnesota.

[SEAL.] (Signed) B. H. GOULD,
Town Clerk of said Town.

23 Endorsed: District court, county of Wabasha, town of Elgin. Winona & St. Peter R. R. Co. Summons & complaint. C. K. Davis & Kellogg & Eaton, pl'ff's att'y-. Filed June 24, 1885. Chas. J. Stauff.

EXHIBIT "F."

$35. $35.

The Town of Elgin will pay to the holder hereof on the first day of January, 1899, at the office of the treasurer of the State of Minne-

sota or at such other place as is or may be designated by law, thirty-five dollars for one year's interest on bond No. 3.

D. F. FERGUSON, *Chairman.*
B. H. GOULD, *Town Clerk.*

STATE OF MINNESOTA, }
County of Winona, } ss:

William H. Fellen, of said county, being duly sworn, says he is the chairman of the board of supervisors of The Town of Elgin, the plaintiff in this action, and that the foregoing complaint is true to deponent's own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

WILLIAM H. FELLEN,
Chairman Supervisors of the Town of Elgin.

Subscribed and sworn to before me this 16th day of September, A. D. 1884.

[NOTARIAL SEAL.] J. F. POPE,
Notary Public.

See next amended complaint.

23*a* District Court, Wabasha County.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

It is hereby stipulated and agreed between the parties hereto that the plaintiff may amend its complaint, and the same is hereby amended by inserting herein after tne 8th line of page 5 the following allegation: That after the foregoing petitions and proceedings and on or about November 1st, 1878, and before the issue set forth and described an action was duly begun and instituted in the district court of said State of Minnesota in and for the county of Wabasha, in said State of Minnesota, being the proper court of original jurisdiction therein, — which action one George W. Harrington, a resident citizen and tax-payer of the town of Plainview, a municipal and corporated township under the laws of said State, situated in Wabasha county, Minnesota, was plaintiff and The Supervisors of the Town of Plainview, the Chairman of the Board of Supervisors thereof, and The Town Clerk of said Town of Plainview and the said Plainview Railroad Company were defendants.

That said suit was brought to have the town officers of said town of Plainview perpetually enjoined from issuing and said Plainview Railroad Company from receiving or obtaining any bonds or coupons of said town of Plainview, which bonds and coupons proposed to be issued by said town of Plainview were exactly similar to the bonds and coupons hereafter set forth, and the proceedings, petitions, and steps taken to authorize the issuing said bonds were the

same as in this complaint set forth, all said steps, proceedings, and petitions taken in said town of Plainview having been under and pursuant to section 7, chapter 106, General Laws of 1887 of said State, and the ground on which a perpetual injunction in said suit was asked was because said section 7, chapter 106, Laws of 1877, was unconstitutional and void and said proceedings thereunder wholly invalid.

That in said action summons was duly served on all the defendants therein, and all defendants therein duly appeared and answered and defended therein and said court obtained and had
23*b* full and complete jurisdiction therein, both of the subject-matter and of the parties thereto.

That thereupon, issue having been joined therein, said action was duly tried and determined on its merits and judgment given and rendered therein; that said action was duly appealed to the supreme court of the State of Minnesota and duly tried and determined by said supreme court, by which said supreme court it was, on or about October 6th, 1880, duly determined, adjudged, and decreed therein that said section 7 of the aforesaid act was and is unconstitutional and void, and that all said proceedings taken preliminary to the issue of said bonds and under and by virtue of said act were and are invalid, and that neither said officers nor the town of Plainview had or has any power or authority to issue said bonds or coupons or any of them or said Plainview Railroad Company to receive them; which said judgment remains in full force and effect.

The said allegations and amendment to be considered as fully in issue without answer thereto.

F. B. KELLOGG,
C. K. DAVIS,
Pl'ff's Att'ys.
THOMAS WILSON.

Endorsed: District court, Wabasha county. The Town of Elgin *vs.* The Winona & St. Peter R. R. Co. "Amended complaint." Filed Dec. 28, 1885. Chas. J. Stauff, clerk.

Answer.

STATE OF MINNESOTA:

District Court, County of Wabasha, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD COMPANY, Defendant.

The defendant answers to the complaint:

I.

That, except as hereinafter admitted, it denies the same and each and every allegation and part thereof.

II.

That it admits to be true the matters and facts alleged on the first page of the complaint, and it admits and alleges that on the 22d day of January, 1878, the Plainview Railroad Company made and delivered to B. H. Gould and caused to be filed with him as town clerk of said town of Elgin, in pursuance and in conformity with the provisions of section 4 of chapter 106 of the General Laws of 1877 a definite proposition in writing, signed by the president and secretary of said railroad company and sealed with its seal, which proposition contained a statement of the amount of bonds desired, viz., $40,000, the time when payable, viz., twenty years from the date of the same, and that the same were payable before maturity, at the option of the said town; the rate of interest they
24 should bear, viz., seven per cent. per annum; and said proposition also contained a statement specifying when said bonds were to be delivered, with reference to the time of construction of the said railroad, viz., whenever and as soon as said railroad company should have its line of railroad graded, the ties and iron laid thereon, with cars running thereon, from a point of junction with the Winona & St. Peter railroad in the county of Olmsted east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed on December 31st, 1877, provided the same should be completed during the year A. D. 1878; that a substantial copy of said proposition is appended to the complaint and is referred to and made a part of this answer, and the said town clerk immediately on the filing of such proposition endorsed thereon the date of its receipt by him and did forthwith transcribe the said proposition into a record book of said town.

III.

That within three months after the filing of said proposition with the said town clerk, to wit, on the 22d day of January, 1878, the Plainview Railroad Company caused notice to be given, as prescribed in the fifth section of said chapter one hundred and six of the General Laws of the year 1877, in three public places in said town of Elgin, stating that after the 29th day of January, A. D. 1878, a petition to the proper authorities of said town, viz., to the board of supervisors of said town, of Elgin would be presented to the resident taxpayers of said town for their signatures, asking said town board of supervisors as such authorities of said town to agree to the
25 proposition (aforesaid), a copy of which was attached to said notice, and a substantial copy of which notice and proposition is attached to the complaint herein and referred to as a part of this answer.

That said railroad company caused said notice, with a copy of the proposition aforesaid thereto attached, to be duly posted in three public places in said town on the 22d day of January, A. D. 1878, and to be published for two successive weeks in the "Plainview

News," a weekly newspaper printed and published in the town of Plainview, in said county.

That the day of the first publication of the said notice was the 23d day of January, 1878, and the day of the second publication was the 30th day of January, A. D. 1878; that there was no newspaper then published in said town of Elgin, and the said Plainview News was published at the nearest place to said town of Elgin at which any newspaper was then published.

IV.

That within four months after the filing of said proposition as aforesaid with the said town clerk, to wit, on the 28th day of March, 1878, the Plainview Railroad Company delivered to said town clerk substantial copies of said proposition so filed with a petition to the proper authorities of said town asking such authorities to agree to such proposition appended thereto, bearing the signature of a majority of the persons residing in said town who were assessed for taxes upon real or personal estate in such town, as shown by the last assessment-roll of the said town, which signatures were verified by the affidavits of some person witnessing the said signatures.

26 That said petitions were presented to and signed by the persons whose names are attached thereto after the 29th day of January, A. D. 1878, and on and prior to the 28th day of March, A. D. 1878. Said petition is in the following words and figures:

"*Petition.*

To the town board of supervisors of the town of Elgin, in the county of Wabasha and State of Minnesota:

We whose names are hereto subscribed, being residents of said town, and who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company to which this petition is appended.

Dated this 30th day of January, 1878."

V.

That on the 28th day of March, A. D. 1878, and after all the steps aforesaid had been taken and all the acts aforesaid done, the board of supervisors of the said town of Elgin held a meeting at the office of the town clerk of the said town, at which there were present all the supervisors of said town and the said town clerk, and at such meeting the said board of supervisors determined and adjudged, among other things, as the fact was and is, "that a majority of the resident tax-payers of said town of Elgin who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town of Elgin, had signed said petition and request," and resolved, determined, and adjudged "that the said prop-

osition of the said Plainview Railroad Company to the said town asking aid to the construction of said company's railroad by
27 the bonds of said town in the sum of forty thousand dollars be, and the same is hereby, accepted and agreed to on the part of the said town, so far as the issue of the bonds of said town to said railroad company on the terms and conditions in said proposition stated;" and resolved further "that the bonds of the said town of Elgin, to the amount of forty thousand dollars, executed in proper legal form, with interest coupons attached and payable as in the said proposition requested, be, and the same are hereby, authorized and directed to be issued to the said Plainview Railroad Company whenever and as soon as the said company shall have its railroad completed, with the cars running thereon as specified in said proposition;" and resolved further "that the issue of stock by the said Plainview Railroad Company to the town of Elgin, in said county, in consideration of the bonds of said town, in the amount of forty thousand ($40,000) dollars, be, and the same is hereby, waived, and that the said railroad company be, and hereby is, absolved from any and all obligations to issue the said stock."

"It being by us adjudged and determined that it will not be to the best interest of the said town to accept or receive the said stock, and on behalf of and for said town of Elgin we, the supervisors of said town, as the proper authorities thereof, do hereby relinquish any and all right to the issue of the said stock of the said railroad company, and the reception of said stock is hereby declined and refused."

And the Plainview Railroad Company has not issued or delivered or offered to issue or deliver any of its stock to said town, for
28 the reason that the supervisors of said town, deeming it for the interest of such town to do so, waived the issuance and delivery of said stock.

VI.

That a copy of the resolution of the said board at said meeting is attached to the complaint and referred to and made a part of this answer.

VII.

That, relying on and induced and influenced by the said several acts and doings, and particularly by the said resolution of the said board of supervisors, the Plainview Railroad Company constructed and had before the issue of the bonds of said town constructed its line of road and had the same graded and the ties and iron laid thereon, with the cars running thereon, from a point of junction with the Winona & St. Peter railroad in the county of Olmstead east of the west line of the town of Eyota, in said county of Olmstead, to a point within the corporate limits of the village of Plainview as the same existed on December 31st, 1877, and has in all respects complied with the terms and conditions specified in said proposition by it to be performed.

VIII.

That defendant is informed and believes that after the said road was built and the said proposition in all respects complied with by the said Plainview Railroad Company the supervisors of said town adopted a resolution or series of resolutions, a substantial copy of which is annexed to the complaint herein and marked Exhibit "D."

IX.

That defendant is informed and believes that thereupon
29 the bonds of the said town of the par value of $40,000, of the denomination stated in the complaint, with interest coupons attached as stated in the complaint, were issued by the said town, and that the same were delivered, transferred, and negotiated as hereinafter alleged, and that Exhibit "E," attached to the complaint, is a substantial copy of each of said bonds, and Exhibit "F," attached to the complaint, is a substantial copy of the coupons attached to said bonds, and that the bonds and coupons herein referred to are the same referred to in the complaint herein.

X.

That prior to the 10th day of May, A. D. 1878, Geo. W. Van Dusen was the owner of all the stock of the said Plainview Railroad Company and had the control of the said corporation and all of its property, and on the day last aforesaid, for the purpose of inducing the Chicago & Northwestern Railway Company, a corporation created and existing under the laws of the States of Illinois and Wisconsin, to build or to advance money to aid in the building of the said road, he represented to the Chicago & Northwestern Railway Company that he had obtained aid, to be paid to the said Plainview Railroad Company by this plaintiff and other towns upon the completion of said road in a given time and manner as agreed upon, and that he had procured right of way for said road and done certain other acts and things requisite and necessary to be done for the completion of said road; and he then and there, for a valuable consideration to him paid, represented and agreed, among other things, that he would cause to be issued to the said Chicago & Northwestern Railway Company said bonds and transfer to it said right of way
and other property and rights which he had acquired, which
30 were necessary for the building of the said road, in case it would advance and furnish money necessary to aid in the building of and completion of said road; that it (said Chicago & Northwestern Railway Company), induced and influenced by the said representation and agreements and believing and relying thereon, accepted said offer and complied with said request and advanced large sums of money to aid in the building of the said line of road, and the said line of road was, by the use of the money so advanced, built, equipped, and put in operation within the time and in the manner specified in the proposition made to the plaintiff by

the said Plainview Railroad Company as aforesaid; and thereafter and in pursuance of the agreement and understanding aforesaid the bonds of the plaintiff were issued and delivered to the Chicago & Northwestern Railway Company, and the said Plainview Railroad Company did not nor did any of its officers sell or negotiate the said bonds or any of them to any person or company or receive any consideration therefor, nor was there any consideration paid therefor by the said Chicago & Northwestern Railway Company, except the money advanced by it to aid in the building of the said line of road, which money was advanced and furnished by the last-named company long prior to the time when said bonds were issued by the plaintiff; and this defendant alleges, upon information and belief, that when and up to the time the said bonds were issued and when and up to the time they were delivered to the said Chicago & Northwestern Railway Company the said Geo. W. Van Dusen and the Plainview Railroad Company and its officers
31 and the Chicago & Northwestern Railway Company and its officers and the officers of the plaintiff town believed that the law under which said bonds were issued was valid and constitutional, and that all the steps taken under said law as conditions precedent to the issuance of the said bonds were legally taken, and that every act and thing proper or necessary to be done in order to comply with the laws of the State and with the said proposition of said Plainview Railroad Company in order to authorize and make valid the issue of said bonds had been done, and that said bonds were legally issued; and, as this defendant believes, none of said persons did or omitted to do any act in the premises with the intent or purpose to cheat or injure the plaintiff town, but, on the contrary, that they and each of them believed that they had a right, legally and equitably, to take each and every step taken and to do each and every act done in the premises as aforesaid; and this defendant particularly alleges that the said Plainview Railroad Company did not nor did any of its officers or agents negotiate or sell or dispose of or transfer said bonds or coupons or any of them, nor did it or they permit or consent to any such sale, transfer, or disposal with a view to injure or cheat the plaintiff town or to place said bonds in the hands of a *bona fide* purchaser for value, or so as to give any advantage whatever to the holders of such bonds or coupons in the collection thereof, or so as or with any view to put the plaintiff at a disadvantage in any suit on or to collect any of such bonds or coupons.

And this defendant alleges that when and long before the said bonds were transferred to the Chicago & Northwestern Railway Company it (said Chicago & Northwestern Railway Company) had
32 full notice and knowledge of all the facts which could in any manner affect the validity of the said bonds and of the law under which they were issued and of the provisions of the constitution and statutes of Minnesota which it is alleged affect their validity, and it had also notice and knowledge that they were issued under and in pursuance of a petition of the tax-payers of said town under and in pursuance of the provisions of section 7 of chapter 106 of the General Laws of Minnesota for the year 1877.

XI.

That the line of road of the said Plainview Railroad Company was in process of construction for a long time prior to the time when said bonds were issued, and it was during all such time well known by the officers of the plaintiff town and generally by the residents and tax-payers of the said town—as the fact was—that the said road was being built and the money advanced to aid in the building thereof on the faith and belief that the aid promised thereto by the plaintiff town and other towns as aforesaid would be thereby earned and secured, and until after the said road was fully completed no objection was made by any one to the issuance of said bonds.

XII.

That after said bonds were issued as aforesaid, and after some of them had been sold and negotiated by the said Chicago & Northwestern Railway Company, to wit, in the year A. D. 1881; Samuel Marshall and Charles F. Ilsley, being the owners of some of the overdue coupons attached to said bonds, brought suit in the circuit court of the United States in and for the district of Minnesota
33 against this plaintiff to recover the sum due on said coupons; that in said suit this plaintiff appeared and defended on the ground that said bonds were not legally issued and that the law under and in pursuance of which they were issued was unconstitutional.

That said court had jurisdiction of the parties to said suit and of the cause of action, and at the June term of the said court, in said year 1881, judgment was rendered in said action in favor of the plaintiff and against the defendant, in and by which it was held and adjudged that the said bonds were legally issued and that they were valid and binding obligations of the said town, this plaintiff.

That said judgment is in full force and unreversed.

XIII.

That the road of the said Plainview Railroad Company was mortgaged for the sum of one hundred thousand dollars ($100,000) on the first day of September, A. D. 1878, which sum becomes payable on the first day of September, A. D. 1908, and bears interest at the rate of seven per cent per annum, payable annually, and that no part thereof has been paid; but the same and the whole thereof was at the time this defendant purchased said line of road and is a valid existing lien and incumbrance on the property and franchises of the said Plainview Railroad Company.

XIV.

That on the 11th day of May, A. D. 1881, this defendant, The Winona & St. Peter Railroad Company, purchased the stock,

34 property, and franchises of the said Plainview Railroad Company, and ever since has owned the same; but that the said property and franchises so purchased were not then and have not since been and are not now worth any sum or of any value in excess of the incumbrance thereon as aforesaid.

XV.

That the said Samuel Marshall and Charles F. Ilsley, who purchased some of the said bonds or coupons, had, when they purchased the same, notice and knowledge of the terms of the law under which they were issued and of the proceedings had as a condition precedent to their issue; and this defendant denies that they have or had or could in law have any greater right to recover thereon than the Plainview Railroad Company would have if it owned said bonds; and this defendant denies that the plaintiff has been or is or could be by the transfer of said bonds or coupons deprived of any defense which it could have as against the Plainview Railroad Company.

Wherefore the defendant prays judgment that this action be dismissed, and that it recover of the plaintiff its costs and disbursements herein.

THOMAS WILSON,
Defendant's Attorney, Winona, Minn.

Endorsed: District court, 3rd judicial district, county of Wabasha. Town of Elgin ag'st W. & St. P. R. R. Co. Answer. Copy. Thomas Wilson, pl'ff's att'y, Winona, Minn.

STATE OF MINNESOTA, }
County of Winona, } *ss:*

Thomas Wilson came before me personally and, being duly sworn, doth say that he is attorney for the defendant in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true; and the reason why this answer is not verified by an officer of defendant is that the general officers of defendant having knowledge of the facts are absent from this county.

THOMAS WILSON.

Subscribed & sworn to before me on this 31 day of October, A. D. 1884.

W. A. ALLEN,
Notary Public, Winona Co., Minn.

Filed Dec. 28, 1885.

CHAS. J. STAUFF, *Clerk.*

35 *Reply.*

STATE OF MINNESOTA, } ss:
County of Wabasha, }

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD CO., Defendant.

The plaintiff, for reply to the defendant's answer herein, alleges and admits that the Plainview Railroad Company made and delivered to the town clerk of the town of Elgin the proposition as therein alleged, and the same was duly transcribed in the records of the town clerk, as in the said answer alleged.

The plaintiff admits that the Plainview Railroad Company gave the notice by posting the same in three public places in the town of Elgin and by publishing the same in the Plainview News, as in the said answer alleged.

The plaintiff admits that within four months after the filing of said proposition with said town clerk the Plainview Railroad Company delivered to said town clerk certain petitions to the town board of supervisors of said town, with substantial copies of said proposition thereto attached, which said petitions, when so filed, bore the signatures of tax-payers of said town, as in said complaint alleged, and not otherwise; and plaintiff denies that any petition or petitions bearing the signatures of the resident tax-payers of said town or any of them relative to said matter was ever made or filed in the town clerk's office, except as alleged in the complaint in this action.

36 The plaintiff admits that the supervisors of said town of Elgin, on the 28th day of March, 1878, adopted the resolution attached to the complaint marked Exhibit "C," and also thereafter and as alleged in the complaint passed the resolution marked Exhibit "D" of said complaint, and admits that the Plainview Railroad Company built and constructed its railroad and had its cars running thereon, as in the complaint alleged, and complied with the terms and conditions specified in its proposition filed with the town clerk of said town of Elgin, as alleged in said complaint, and not otherwise.

Plaintiff admits that the said line of railroad was in process of construction during the summer prior to issuing the said bonds, and admits that the road of the said Plainview Railroad Company was mortgaged for one hundred thousand dollars, but as to whether said mortgage was at the time the defendant purchased the said line of road a valid existing lien and incumbrance on the property and franchises of the said Plainview Railroad Company and as to whether the same remains unpaid this plaintiff has no knowledge or information sufficient to form a belief.

The plaintiff admits that on the 11th day of May, 1881, the de-

fendant purchased the stock, property, and franchises of the said railroad company and ever since has owned the same.

The plaintiff admits that Samuel Marshall and Charles F. Ilsley brought suit against the town of Elgin in the United States circuit court for the district of Minnesota and recovered judgment, as in the complaint alleged, and not otherwise.

37 Further replying, the plaintiff denies each and every other allegation or part of allegation, matter, or thing in said answer contained.

Wherefore the plaintiff demands judgment as in said complaint prayed.

C. K. DAVIS AND
KELLOGG & EATON,
Attorneys for Plaintiff.

STATE OF MINNESOTA, }
County of Olmsted, } ss:

Frank Kellogg, of said county, being duly sworn, says he is one of the attorneys of the plaintiff in this action; that the plaintiff and all its officers are absent from the county of Olmsted, where this deponent resides, and that the foregoing reply is true to the best of deponent's knowledge, information, and belief.

FRANK B. KELLOGG.

Subscribed and sworn to before me this 10th day of November, A. D. 1884.

[NOTARIAL SEAL.] BURT W. EATON,
Notary Public.

Endorsed: District court, 3rd judicial district, county of Wabasha. Town of Elgin ag'st Winona & St. Peter Railroad Co. Reply. C. K. Davis, Kellogg & Eaton, pl'ff's att'ys. Filed June 26, 1885. Chas. J. Stauff, clerk.

38 District Court, Wabasha County, State of Minnesota.

TOWN OF ELGIN
vs.
WINONA & ST. PETER RAILROAD COMPANY.

This cause came on for trial at Wabasha, Minnesota, on the 2nd day of July, A. D. 1885, Hon. L. W. Collins, district judge, presiding, Hon. C. K. Davis and F. W. Kellogg, Esq., appearing for the plaintiff, and Thomas Wilson, Esq., appearing for the defendant.

Plaintiff's counsel offered and read in evidence stipulation of facts, a copy of which is hereto annexed, marked Exhibit "A."

Plaintiff's counsel also offered and read in evidence certified copy of deed of conveyance from the Plainview Railroad Company to the Winona & St. Peter Railroad Company, dated May 11th, A. D. 1881, acknowledged the same day, and recorded in the county of Olmsted April 6th, 1885, Book 53 of Deeds, 403, marked Exhibit "B," which is hereto annexed.

To which defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling defendant duly excepted.

Plaintiff's counsel also offered and read in evidence stipulation of facts, a copy of which is hereto annexed, marked Exhibit "C," and made a part of this case.

Plaintiff's counsel also offered and read in evidence a stipulation
39 that the cases in the United States circuit court first brought by Marshall and Ilsley against these defendants were taken to the Supreme Court of the United States and dismissed, because the amount in controversy did not exceed $5,000, a copy of which is annexed, marked Exhibit "D."

Plaintiff's counsel also offered in evidence certified copy of record in supreme court of State of Minnesota in the suit referred to in the pleadings herein, wherein George W. Harrington was plaintiff and appellant and The Town of Plainview and others, defendants, which record (Exhibit "E") includes the following papers and none others, viz:

The complaint, with proof of service thereof and of the summons, the answer, three several stipulations of facts, the finding and decision of the court, judgment, order denying a new trial, notice of appeal from the order denying a new trial, bond on appeal from said order, approval of said bond, certificate of clerk, note of issue in supreme court, notice of trial in supreme court, minutes of argument in supreme court, order for judgment in supreme court, notice of taxation of costs in the last-named court, order of supreme court reversing judgment of district court, certificate of clerk of supreme court, and syllabus and opinion of supreme court in said case.

The complaint, answer, finding, and decision of the court and stipulation of facts are in the following words and figures, viz:

Complaint.

40 Title.

The plaintiff herein complains—

1.

That the town of Plainview aforesaid is and for more than five years has been a duly organized town and municipal corporation within the said county of Wabasha; that said T. G. Bolton is and for and during all the time hereinafter mentioned has been the chairman of the board of supervisors of said town, duly elected and qualified and acting as such; that said C. E. Daniels and S. Struble are and during said time have been the remaining two supervisors of said town; that said A. B. W. Norton is and during all said time has been the town clerk of said town, all duly elected and qualified and acting as such officers of said town, respectively; that said The Plainview Railroad Company is and during all said time has been

a corporation duly organized and existing under the laws of this State; that this plaintiff is and for more than five years last past has been a resident, citizen, and tax-payer of said town of Plainview, and that this plaintiff owns and is possessed of a large amount of real and personal property, all situated and being within said town and subject to taxation therein, and which is of the value of at least six thousand dollars, and which is, has been, is and will continue to be taxed and subject to taxation within said town for all purposes of taxation therein.

2.

That on the 31st day of January, 1878, said The Plainview Railroad Company made and delivered to the said town clerk of said town a proposition, in writing, signed by its president and secretary and sealed with its seal, a true copy of which proposition is hereto attached, marked "Exhibit A," and which is hereby referred to and made part of this complaint; that on said 31st day of January, 1878, said president and secretary of said railroad company issued a pretended notice, signed by them and sealed with the seal of said railroad company, a true copy of which notice is hereto attached, marked "Exhibit B," and which is hereto attached and referred to as and made part of this complaint, which notice was on said 31st day of January, 1878, posted up in three public places in said town and was published in a certain newspaper printed and published in said town, and that, except as above stated, no notice whatever of or concerning any of the acts, matters, or things herein related, referred to, or set out has ever been given in any manner whatever; that on the 7th day of February, 1878, various petitions—at least four in number—were made, all of the same tenor and date and each of them having attached thereto a copy of the aforesaid propositions (Exhibit A), which several petitions (except the pretended names signed thereto and such copies of said proposition) were severally in the words and figures following, to wit:

41

Petition.

To the town board of supervisors of the town of Plainview, in the county of Wabasha and State of Minnesota:

We, whose names are hereto subscribed, being residents of said town and who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company to which this petition is appended.

Dated this 7th day of February, 1878.

That afterwards, between said 7th day of February, 1878, and 30th day of March, 1878, each of said petitions were by certain persons acting for and on behalf of said railroad company privately presented to certain resident tax-payers of said town of Plainview, less than a

majority of such resident tax-payers, for their signatures, and obtained their signatures thereto; that for the purpose of making it appear that a majority of the resident tax-payers of said town, as shown by the last assessment-roll thereof, had signed said petition the persons circulating and presenting the same obtained and procured to be signed thereto the signatures of a large number of copartnership firms as such firms, and thereupon counted and represented such firm signatures of so many persons residing in said town and tax-payers therein, and also obtained separately thereto the signature of the individual persons composing such copartnership firms, whose said signatures were also by them counted and represented to be signatures of resident tax-payers of said town, and also
42 obtained thereto what purports to be the signatures of a large number of minor persons signed thereto, not by such minors themselves, but by certain persons pretending thereby to act as guardians of said minors and as such guardians only, signing their names thereto, and also the signatures of certain pretended guardians of certain minors signed as such guardians only; and also the signatures of a large number of women residing in said town and the signatures of certain minor persons therein, all of which signatures were counted and represented to be the signatures of resident tax-payers of said town, having authority to sign the same and thereby bind said town, and all of the signatures aforesaid were counted and considered as part of and in order to constitute a majority of the persons residing in said town who were assessed for taxes on real or personal property in said town, as shown by the last assessment-roll thereof, and that the persons who so circulated and presented said petitions presented the same privately to certain other resident tax-payers and legal voters of said town who were assessed for taxes therein as shown by said last assessment-roll thereof, and to induce them to sign the same represented to and informed them that a majority of all persons residing in said town who were assessed for taxes therein as aforesaid had already signed the same, by reason of which the acceptance of said proposition was already assured, and that it was useless for any to withhold longer their assent or their signatures, and thereby, through such representations and not otherwise, obtained the signatures of such persons to said petitions, whereas, in fact, said representations were false, as the parties so making them well knew, a majority of such persons residing and being assessed for taxes on real or personal estate in said town as shown by such last assessment-roll thereof not having in fact signed said petitions; that by reason of and through the acts and practice aforesaid, and not otherwise, and by counting and considering all the pretended signatures of persons and firms, women, guardians, and minors, so obtained to said petitions, and not otherwise, said several petitions were made to appear and do on their face appear to bear the signatures of a majority of the resident tax-payers of said town; that on the 30th day of March, 1878, said railroad company caused said several petitions bearing the signatures obtained thereto as aforesaid and none others, having appended thereto substantial copies of aforesaid proposition, and therewith the affidavits of certain

persons to said petitions attached, to the effect that they (the affiants) after the 7th day of February, 1878, prior to the 1st day of March, 1878, formally presented said several petitions to the several persons whose names are subscribed thereto and the same were signed
43 by each of said persons in the presence of deponents, between said dates, to be delivered to said town clerk of said town.

That, except as aforesaid, no petition of any kind or nature pertaining to said proposition or its subject-matter has been made or presented to any one, or delivered to or filed with said town clerk, or laid before any of the authorities or officers of said town, and that no election has ever been called or held or vote had in said town in relation to said proposition or in relation to any aid of said town to said railroad company for any purpose or the issue of bonds by said town for the purpose of such aid or for any purpose whatever; that thereupon, at a meeting of said board of supervisors of said town held at the office of said town clerk on said 30th day of March, 1878, at which there were present all of said supervisors and said town clerk, said board of supervisors, pretending to act under and by virtue of authority conferred upon them by said petitioners and the proceedings hereinbefore recited and not otherwise, but in fact without any authority, did adopt and place on file in the office of said town clerk a resolution, a true copy of which is hereto attached and marked "Exhibit C," and which is hereby made and referred — as a part of this complaint.

That in fact said supervisors had not then and have not now any authority or power to adopt said resolutions, or to bind said town thereby, or to issue bonds as therein recited, or to waive the issue and delivering to said town (upon the issue and the delivery of such bonds) of the stock in said resolution and in said proposition referred to, and that no proceedings, acts, or steps of any kind have been at any time had, taken, or made to authorize any of the aforesaid acts by said board or any of the officers of said town, or to authorize the issue in any manner, by or in behalf of said town, of such bonds, or any bonds whatever, save only the proceedings, acts, and steps hereinbefore recited, and that the aforesaid resolution was so adopted by said board by the procurement of and at the request of the agents of said railroad company; that said railroad company, pretending to rely upon said action of said board of supervisors and the acts and proceedings hereinbefore set out as an agreement on behalf of and by said town for the issue and delivery to said railroad company of its bonds to the amount of $50,000, of the nature and kind stated in said proposition and upon the terms therein stated, as modified by said resolution, has constructed and completed its line of railroad and now has the same graded, the ties and iron laid thereon, with the cars running thereon, in the manner in said proposition set out, and now claims and demands of said town, its proper authorities,
44 the issue and delivery to it forthwith of said bonds of said town to the said amount of $50,000, without the issue or delivery by said railroad company to or for said town of any stock or shares of its capital stock whatever, and no such shares of its capital stock have been in fact issued or delivered or in any manner offered

or tendered; that said defendants, the supervisors and town clerk of said town, and particularly said chairman of said board of supervisors, and said town clerk, intend and threaten to issue and deliver and, unless restrained and enjoined therefrom by this court, will issue and deliver to said railroad company, without requiring or asking the issue or delivery by it of any shares of its capital stock whatever, the negotiable bonds of said town to the said amount of $50,000 and of the description in said proposition and in said resolution set out, which bonds so issued and delivered will thereupon be negotiated and will become a charge upon the indebtedness against said town for the payment of which the plaintiff's said property in said town will be yearly subject to taxation and taxed, and by reason thereof great and burdensome taxes for the payment of such indebtedness will annually hereafter be assessed and levied upon and become an apparent incumbrance, lien, and cloud upon the title of plaintiff to his said property, which will by reason thereof depreciate in value; that plaintiff will thereby be subject to a multiplicity of actions to protect his rights, and will be greatly injured and embarrassed in the use and enjoyment of his said property, and will be put to great costs and expense to protect his rights and interest, and will suffer irreparable injury and damage.

That said officers or said town have no lawful authority to issue nor has said railroad company right or authority to receive any such bonds of said town.

Wherefore plaintiff prays for the judgment of this court perpetually enjoining and restraining said town and its said officers, and particularly said chairman of the said board of supervisors and said town clerk and their successors in office, from issuing or delivering to or for said railroad company any such bonds or any bonds whatever of said town, and enjoining and restraining said railroad company from accepting or receiving any such bonds of said town, and in the meantime and till the determination of this action that a temporary injunction may be issued out of and under the seal of this court against all said defendants herein restraining and enjoining said town and the said officers thereof and their successors from issuing or delivering and said railroad company from receiving any of said bonds or any bonds of said town during the
45 pendency of this suit till its final determination or the further order of the court herein; and plaintiff prays for such other and further relief as to the court may seem just and equitable, and for judgment for his costs and disbursements herein.

TAYLOR & SPERRY,
Attorneys for Plaintiff, Winona, Minn.

The defendants' answer to the complaint:

1.

That, except as hereinafter expressly admitted, they deny the same and each and every allegation and part thereof.

2.

That they admit to be true the matters and facts alleged in the first subdivision of the complaint, and they admit and allege that on the 31st day of January, 1878, the defendant, The Plainview Railroad Company, made and delivered to the defendant, A. B. W. Norton, as town clerk of said town of Plainview, in pursuance of and in conformity with the provisions of section 4 of chapter 106 of the General Laws of 1877 a definite proposition in writing, signed by the president and secretary of said railroad company and sealed with its seal, which proposition contained a statement of the amount of bonds desired, viz., $50,000; the time when payable, viz., twenty years from the date of the same, and that the same were payable before maturity, at the option of the said town; the rate of interest which they should bear, viz., seven per cent. per annum; and said proposition also contained a statement specifying when said bonds are to be delivered with reference to the time of construction of the said railroad, viz., whenever and as soon as said railroad company shall have its line of railroad graded, the ties and iron laid thereon, with cars running thereon from a point of junction with the Winona, and St. Peter railroad in the county of Olmstead east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed on December 31, 1877, provided the same is completed during the year A. D. 1878.

That a substantial copy of said proposition is appended to the complaint and is referred to and made a part of this answer; and the said town clerk immediately on the filing of such proposition endorsed thereon the date of its receipt by him, and did forthwith transcribe the said proposition into a record book of said town.

46 3.

That within three months after the filing of said proposition with the said town clerk, to wit, on the 31st day of January, 1878, the defendant, The Plainview Railroad Company, caused notice to be given, as prescribed in the fifth section of said chapter one hundred and six of the General Laws of the year 1877, in three public places in said town of Plainview, stating that after the sixth day of February, A. D. 1878, a petition to the proper authorities of said town, viz., to the board of supervisors of said town, of Plainview would be presented to the resident tax-payers of said town for their signatures, asking said town board of supervisors as such authorities of said town to agree to the proposition (aforesaid), a copy of which was attached to said notice, and a substantial copy of which notice and proposition is attached to the complaint herein and referred to as a part of this answer.

That the said railroad company caused said notice, with the copy of the proposition aforesaid thereto attached, to be duly posted in three public places in said town on the 31st day of January, A. D.

1878, and to be published for two successive weeks in the "Plainview News," a weekly newspaper printed and published in said town of Plainview.

That the day of the first publication of the said notice was the sixth day of February, 1878, and the day of the second publication was the 13th day of February, A. D. 1878.

4.

That within five months after the filing of said proposition as aforesaid with the said town clerk, to wit, on the 30th day of March, 1878, the defendant, The Plainview Railway Company, delivered to said town clerk substantial copies of said proposition so filed with such petition to the proper authorities of said town, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in said town who were assessed for taxes upon real or personal estate in such town, as shown by the last assessment-roll of the said town, which signatures were verified by the affidavits of some person witnessing the said signatures.

That said petitions were presented to and signed by the persons whose names are attached thereto between the seventh day of February, A. D. 1878, and on and prior to the first day of March, A. D. 1878, and a substantial copy of said petition is set out in the complaint herein and is referred to and made a part of this answer.

47 5.

That on the 30th day of March, A. D. 1878, and after all the steps aforesaid had been taken and all the acts aforesaid done, the board of supervisors of the said town of Plainview held a meeting at the office of the town clerk of the said town, at which there were present all the supervisors of said town and the said town clerk, and at such meeting the said board of supervisors determined and adjudged, among other things, as the fact was and is, "that a majority of the resident tax-payers of said town of Plainview who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town of Plainview, had signed said petition and request;" and resolved, determined, and adjudged—

"That the said proposition of the said Plainview Railroad Company to the said town asking aid to the construction of said company's railroad by the bonds of said town in the sum of fifty thousand dollars be, and the same is hereby, accepted and agreed to on the part of the said town so far as the issue of the bonds of said town to said railroad company on the terms and conditions in said proposition stated;" and resolved further "that the bonds of the said town of Plainview, to the amount of fifty thousand dollars, executed in proper legal form, with interest coupons attached, and payable as in the said proposition requested, be, and the same are hereby, authorized and directed to be issued to the said Plainview Railroad Company whenever and as soon as the said company shall have its

railroad completed, with the cars running thereon, as specified in the said proposition."

And resolved further "that the issue of stock by the said Plainview Railroad Company to the town of Plainview, in said county, in consideration of the bonds of said town, in the amount of fifty thousand dollars, be, and the same is hereby, waived, and the said railroad company be, and hereby is, absolved from any and all obligation to issue the said stock."

"It being by us adjudged and determined that it will not be to the best interest of the said town to accept or receive the said stock, and on behalf and for said town of Plainview we, the supervisors of said town, as the proper authorities thereof, do hereby relinquish any and all right to the issue of the said stock of the said railroad company, and the reception of said stock is hereby declined and refused."

And the defendant, The Plainview Railroad Company, has not issued or delivered or offered to issue or deliver any of its stock to said town, for the reason that the supervisors of said town, deeming it for the interest of such town to do so, waived the issuance and delivery of said stock.

48 6.

That a copy of the resolution of the said board at said meeting is attached to the complaint and referred to and made a part of this answer.

7.

That, relying on and induced and influenced by the said several acts and doings, and particularly by the said resolution of the said board of supervisors, the defendant, The Plainview Railroad Company, constructed and had before the commencement of this action constructed its line of road, and has and had the same graded and the ties and iron laid thereon, with the cars running thereon, from a point of junction with the Winona & St. Peter railroad in the county of Olmsted east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed on December 31st, 1877, and in all respects complied with the terms and conditions specified in said proposition by it to be performed.

8.

That by reason of the premises the said The Plainview Railroad Company has claimed and does claim the said bonds of the said town, and claim to have earned and to be entitled to the same; and the other defendants herein are ready and willing to issue the same in pursuance of and in accordance with the mutual agreement aforesaid.

Wherefore the defendants demand judgment of this court that the defendant, The Plainview Railroad Company, is entitled to the said bonds, and that the same be issued and delivered to it in pur-

suance of the mutual agreement aforesaid, and for such other and further relief as may be just, besides costs and disbursements in this action.

WILSON & GALE AND
C. T. BENEDICT,
Defendants' Attorneys.

49 "EXHIBIT B."

District Court, Wabasha County, State of Minnesota.

GEORGE W. HARRINGTON *vs.* TOWN OF PLAINVIEW *et al.*

It is hereby stipulated in the above-entitled action that the only points on which the plaintiff will rely or attempt to establish by proof on the trial of this action are as follows:

1.

That the proposition of the R. R. company to the town referred to in the pleading was not filed by the town clerk in his office or recorded or transcribed in any record thereof or the date of its reception by him endorsed thereon at any time prior to the signing and presentation of the petition.

2.

That the notice given, posted, and published by the R. R. company is not a valid notice under the statute on account of its insufficiency in form, and the fact that it was given by the R. R. company instead of by the town clerk, and that it was not published in time, but it is admitted that it was published as alleged in answer.

3.

That the affidavit verifying the signatures of the petition are insufficient in matter and form.

4.

That the statute under which the proceedings were had is unconstitutional and void.

5.

That the supervisors had no power or authority to waive the issuance of stock to the town by the railroad company.

Winona, January 23d, 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

It is admitted that the allegation of and facts set out in subdivision seven of the answer are true as therein alleged.

Findings.

Title.

This cause was by consent tried by the court, at chambers, at Winona, on the 27th day of January, A. D. 1879.

Upon commencing the trial of said cause the parties thereto filed with the court a written stipulation, a copy of which is hereto annexed and marked "B."

50 The evidence therefore was confined to the point specified and reserved in said stipulation. From the evidence I find the following facts:

1.

The proposition of the defendant railroad company to defendant town in due form was filed in the office of town clerk of said town on the 31st day of January, 1878, and a certificate of such filing endorsed thereon by him on the same day has remained on file in his office ever since. Said proposition was transcribed or recorded by said town clerk on the 30th day of March, 1878, and not before. The petition containing the signatures of the tax-payers was signed and delivered to the town clerk before said proposition had been in fact recorded by the town clerk, on the 30th day of March, 1878, as aforesaid.

2.

The affidavits verifying the signatures of the tax-payers to the petition were in words and form as follows:

STATE OF MINNESOTA, } *ss:*
County of Wabasha, }

A B, of the town of Plainview, in said county, being duly sworn, says that after the 7th day of February, 1878, and prior to the first day of March, 1878, he personally presented the foregoing petition to the several persons whose names are subscribed thereto above, being (number) persons in number, and the same was signed by each of said persons in the presence of deponent between said dates, and each of said signers were then residents of said town.

(Signed) A B.

Sworn before me this 1st day of March, 1878.

C D, *Notary Public.*

From the foregoing facts I find as conclusions of law—

1.

That where the proposition of a railroad company has been duly filed in the office of the town clerk and the date of its filing endorsed thereon the mere delay of the town clerk in transcribing it into the record book of the town until after the filing and presenta-

tion of the petition of the tax-payers will not invalidate the proceedings.

2.

The notice given in this case by the railroad company of the presentation of a petition to the town authorities to the tax-payers of the town for their signatures was in accordance with subdivision first of section 7 of the acts in question.

51

3.

That the affidavits verifying the signatures of the tax-payers are in accordance with subdivision two of said section and act.

4.

That under the act in question (chapters 1 and 106 of Laws of 1877) the board of supervisors have the same power to waive the issuance of railroad stock to the town where the agreement between the railroad company and the town is arrived at through petition as where it is arrived at through election.

But even if they had not such power their attempt to exercise it would, under the fact of this case, be no ground for an injunction against the issuing of the bonds.

5.

The provisions of this act under which these proceedings were had and which provide for the issuing of bonds upon petition of a majority of the resident tax-payers of the town are not unconstitutional.

This question of the constitutionality of the act in question was the principal one discussed by counsel. I have not investigated this point very thoroughly for two reasons—

First. Whichever way it be decided it will doubtless be desired to have the question reviewed by the Supreme Court.

Second. This not being a court of last resort, I would not in any case feel warranted in holding any legislative enactment unconstitutional unless it was very clearly so.

But so far as I have investigated the question I have not been able to give my assent to the positions taken by plaintiff's counsel, notwithstanding the ability of his argument in their defense. As I understand it the argument against the constitutionality of this law is substantially this:

First. That while a municipal corporation may be compelled by legislative enactment to provide for the construction of improvements of an exclusively public character, such as an ordinary highway, yet it cannot be compelled without its consent to aid in the construction of a work like a railroad which although public in some respects is private in others.

Second. That the only true methods by which a town as a munic-

ipal corporation can legally and constitutionally express its assent are, 1st, through the electors at an election; 2d, through its municipal officers, the board of supervisors.

52 Third. That therefore the assent of tax-payers (who may not be electors) expressed through petition is not any assent on the part of the town as a corporation.

Fourth. That therefore the provision of this law which makes the issuing of the bonds compulsory upon petition of an assent of the majority of the tax-payers of the town is unconstitutional, because it requires the issue of the bonds without any legal assent thereto on part of the town.

Notwithstanding the highly respectable authorities cited, which make a distinction as to the power of the Legislature over municipal corporations between purposes which they call purely public and those which they term partly public and partly private, yet I doubt whether such distinction can be legally sustained, at least in view of certain legal principles settled by our supreme court. It is the settled doctrine of this State that the Legislative control over municipal corporations, except as restrained by the Constitution, is supreme.

State *vs.* McFadden, 23 Minn., 40.

That to aid a public improvement the Legislature may pass a mandatory statute compelling a town, without its consent, to defray the expense.

Guilder *vs.* Town Otsego, 20 Minn., 74.
Guilder *vs.* Town Dayton, 22 Minn., 366.

And in Davidson *vs.* Ramsey County, 18 Minn., 482, it is held that railroads are modern highways, and that a donation of money to aid in their construction is a donation for a public purpose, for which the power of taxation may lawfully be exercised. In view of these decisions it would seem that to concede the competency of a municipal corporation by its own consent, with the authority of the Legislature, to do the acts in question would be fatal to the argument that the Legislature could not compel the corporation to do the same act without its consent. Of course we are speaking simply of the question of legal power and not of propriety or justice.

But even if it be conceded that the consent of the town was necessary, yet I do not think it follows that the only methods by which that consent could be given are through the board of supervisors or the electors of the town at the polls.

An election for the purpose of ascertaining the wishes of the town on such a question is no more recognized in the constitution than a petition of tax-payers. They are simply two different methods of getting at the same thing—the wishes of those who are to bear the burden—and it will be observed that two of the principal cases cited to the point that the assent of the town is necessary hold or at least clearly imply that an assent of tax-payers expressed through a petition would be a valid mode of expressing consent on part of a municipal corporation.

53 People *vs.* Batcheldor, 53 N. Y., 128.
Horton *vs.* Thompson, 71 N. Y., 518.

Neither can I find any case which holds that the assent of a corporation can only be given by its corporate officers or by the electors at the polls, unless the cases cited in 51 Ill. would lead logically to such a conclusion.

But it will be observed that these decisions were based mainly upon the construction which the supreme court of Illinois put upon section 5 of article 9 of their constitution, which provides "That the corporate authorities of counties, townships, &c., may be vested with power to assess and collect taxes for corporate purposes."

This is construed as a limitation upon the power of the Legislature.

That a somewhat similar provision in our constitution (sec. 5, article 11), which reads, "Any county and township organization shall have such power of local taxation as may be prescribed by law," imposes no limitation upon the Legislature in the matter of taxing municipal corporations, either as to the purposes for which or the agencies through which the tax may be imposed, is clearly settled by our own supreme court in the case of Davidson *vs.* Ramsey County and Guilder *vs.* The Town of Otsego, above cited.

In conclusion, therefore, I find that plaintiff is not entitled to the relief asked for, but that defendants are entitled to judgment dismissing the action and for costs.

February 6, 1879.

WM. MITCHELL,
District Judge.

54 (True and full copies of the exhibits attached to said complaint in Harrington case are attached to the complaint in this action, marked, respectively, A, B, C.)

District Court, Wabasha County, State of Minnesota.

GEORGE W. HARRINGTON *against* THE TOWN OF PLAINVIEW *et al.*

It is hereby stipulated that this action shall be tried before the judge at the chambers at any date after the 20th day of December, A. D. 1878, either party having the right to move and bring it on for trial at such time and place, five days' previous notice of such trial to be served on the opposing party; and if the evidence cannot be conveniently obtained at Winona, then the case to be heard at Wabasha (at the court-house) at any time after the 20th day of December, 1878, to be designated and fixed by the judge, and five days' previous notice thereof to be given to the opposite party.

Winona, November 23d, 1878.

TAYLOR & SPINNEY,
Plaintiff's Attorneys.
WILSON & GALE,
Defendants' Attorneys.

Endorsed: Stipulation. Filed in the office of the clerk district court this 17th day of March, A. D. 1879. Chas. J. Stauff, clerk.

Title.

It is hereby stipulated that the "proposition," "notice," "petition," and all the records and files referred to on the trial of this action or on any motion thereon — as if set out "*in hæc verbæ*" in the complaint or answer, and that certified copies of said papers, records, and files, or of any of them, may be used with like force and effect as the originals, and that such originals or copies may
55 be referred to as proof of the contents of the said originals, notwithstanding the fact that it may be admitted in the answer that the copies attached to the complaint are correct, and notwithstanding the fact that the copies or originals so presented may be variant from the copies attached to the complaint or answer.

ROBERT TAYLOR,
Pl'ff's Att'y.
WILSON & GALE,
Def'ts' Att'ys.

56 The judgment, order denying a new trial, notice of appeal from the order denying a new trial, bond on appeal from said order, notice of appeal from said judgment, are all set out *in hæc verbæ* in Exhibit "C" above.

The order for judgment in supreme court (in said Exhibit "E") is in the following words and figures:

Title.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1879, upon the return to the appeal herein—

Now, after full and mature deliberation had therein, it is here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things reversed and cause remanded for judgment pursuant to opinion, and that the appellant above-named have judgment accordingly.

Entered October 20th, A. D. 1880.

By the court.

Attest: SAM. H. NICHOLS, *Clerk.*

The judgment of supreme court in said Exhibit "E" is in the following words and figures:

Title.

Pursuant to an order of court duly made and entered in this cause on the 20th day of October, A. D. 1880, it is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Wabasha, be, and the same hereby is, in all things reversed and cause remanded for judgment

pursuant to opinion; and it is further determined and ad-
57 judged that the appellant above-named do have and recover of said The Town of Plainview, T. G. Bolton, as chairman of the board of supervisors of the town of Plainview, C. E. Daniels and S. Struble as supervisors of said town, and the Plainview Railroad Company, respondents herein, the sum and amount of one hundred and twenty-three dollars and seventy-five cents ($123.75) costs and disbursements in this cause in this court, and that said appellant have execution for the enforcement hereof.

Dated and signed this 16th day of November, 1880.

By the court.

Attest:

[SEAL.] SAM. H. NICHOLS, *Clerk.*

The syllabus and opinion of the supreme court in said case are published in full in 27 Minnesota Reports, at page 224 *et seq.*, to which reference is hereby made; and the defendant refers to the said Exhibit "E" as part of this case, to be referred to on any motion, argument, or subsequent proceedings herein.

To the admission of said Exhibit "E" or of any part thereof the defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection, and the defendant's counsel duly excepted to such ruling.

The plaintiff's counsel also offered in evidence the original records of this court in the same case, including bond on appeal and order denying new trial, and judgment-roll, all of which are included in Exhibits "C," "E," and "Y," hereto attached; to each of which the defendant's counsel objected as incompetent, irrelevant, and immaterial; which objection the court overruled and received the evidence, and the defendant's counsel duly excepted to said ruling.

58 The plaintiff's counsel thereupon offered in evidence the mandate from the supreme court in said case; also the transcript of the judgment of the supreme court, filed February 10th, 1881, marked "F" (a copy of which is hereto annexed, marked Exhibit "F").

Also notice of appeal to the Supreme Court from the judgment rendered in the Harrington case, filed September 15th, 1879; also the bond on said appeal, filed September 15th, 1879, with all endorsements on said papers, copies of all of which are included in Exhibits "C," "E," "F," and "Y," hereto annexed.

To each of which, separatly, the defendant's counsel objected on the ground that the same are incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

Plaintiff's counsel thereupon offered in evidence certified copy of the record of the Supreme Court of the proceedings on appeal by Harrington from the final judgment in Harrington's case aforesaid, a copy of which is annexed hereto, marked Exhibit "Y;" to which defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The plaintiff's counsel thereupon offered in evidence a duly certified transcript of the record of the United States circuit court for the district of Minnesota, marked Exhibit "N," in a suit wherein Marshall and Ilsley are plaintiffs and the Town of Elgin is defendant, which contained the following papers, namely, complaint, summons, return to summons, answer, order to file reply *nunc pro tunc*,
59 reply, stipulation waiving jury trial, stipulation of facts, *stipulation of facts*, minutes of argument, opinion of court, order for judgment, judgment taxation of costs.

In said Exhibit "N" the complaint is in the following language:

United States Circuit Court, District of Minnesota.

SAMUEL MARSHAL and CHAS. F. ILSLEY *vs.* THE TOWN OF ELGIN.

The complaint of the above-named plaintiffs respectfully shows to this court that they reside at the city of Milwaukee, in the State of Wisconsin, and that they are citizens of said State; that the said defendant, The Town of Elgin, of the county of Wabasha, in the State of Minnesota, is a body corporate and politic created and existing under and by virtue of the laws of the State of Minnesota, and that it is a citizen thereof.

First. And the said plaintiffs show that the said defendant, being duly authorized by the laws of the State of Minnesota, on or about the first day of January, A. D. 1879, for value received, made, executed, and delivered its certain bond or writing obligation, in compliance with a resolution of the town board of supervisors of said town, signed by the chairman of the said town board of supervisors of said town and by the town clerk of said town and sealed with the seal of said town, being numbered 3 of a series of 80 of such bonds, wherein and whereby the said Town of Elgin, the defendant in this action, acknowledged itself indebted to the Plainview Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, in the sum of five hundred dollars, which sum the said defendant therein and thereby promised to pay to the said Plainview Railroad Company or to the bearer thereof, at the office of the treasurer of the State of Minnesota or at such other place in said State as was or might be designated by law, on or before the 1st day of January, A. D. 1899, together with interest thereon from the date hereof until such principal sum should be payable, annually, on the first day of January in
60 each year, upon the presentation and surrender of the proper coupon annexed thereto; that at the time of the execution and delivery of said bond twenty coupons, for the sum of thirty-five dollars each and each bearing date and a number corresponding with said bond, and each being for the interest on said bond for each of said years intervening between the date of said bond and the time for the maturity thereof, were annexed to said bond and were issued therewith and signed on behalf of said town by the chairman of its town board of supervisors and by its town clerk, and whereby the said town, the defendant, promised to pay, on the first day of

January of each year during the time said bond had run, the sum of thirty-five dollars to the holder of each of said coupons, at the office of the treasurer of the State of Minnesota or at such other place in said State as was or might be designated by law, for one year's interest on said bond; that the plaintiffs are now the lawful holders, owners, and bearers of said bond and of all the said coupons which were so annexed to said bond, except the one that matured January 1st, 1880; that the said defendant has not paid the annual interest maturing on said bond on the first day of January, A. D. 1881, amounting to the sum of thirty-five dollars, at the office of the treasurer of the State of Minnesota or at any other place designated by law, or elsewhere, or any part thereof, although requested so to do, but to pay the same or any part thereof to the said plaintiffs, although they then and have ever since held the proper coupon therefor annexed to said bond and were and ever since have been ready to surrender the same upon the payment of the said interest so due and unpaid on said bond to the said plaintiffs, the said sum of thirty-five dollars, with interest thereon from the first day of January, A. D. 1881."

(Here follows fourteen counts in the same language as the first cause of action were set out except as to the number of the bonds to which the coupons were attached.)

61 "Sixteenth. And for a further and separate cause of action the said plaintiffs show that the said defendant, being thereto duly authorized by the laws of the State of Minnesota, on or about the first day of January, A. D. 1879, made and executed, for value received, its negotiable coupon or interest warrant, duly signed by the chairman of its town board of supervisors and by its town clerk, of which coupon or interest warrant the following is a copy to wit:

$35. $35.

The Town of Elgin will pay to the holder hereof, on the first day of January, 1881, at the office of the treasurer of the State of Minnesota or at such other place in said State as is or may be designated by law, thirty-five dollars for one year's interest on bond No. 40.

D. F. FERGUSON, *Chairman.*
B. H. GOULD, *Town Clerk.*

That said coupon or interest warrant was, on or about the first day of January, A. D. 1879, duly delivered with said bond, which the said defendant then duly issued under and by virtue of the laws of the State of Minnesota to the Plainview Railroad Company, a corporation created and existing under the laws of the State of Minnesota; and the said plaintiffs are now the lawful owners and holders of said coupon or interest warrant, and that the said defendant has not paid the said sum of thirty-five dollars therein specified at the office of the treasurer of the State of Minnesota or at any other place designated by law, or elsewhere, although requested so to do,

but to pay the same or any part thereof the said defendant hath hitherto wholly refused and doth still refuse; that there is now due and unpaid the said plaintiffs on the said coupon or interest warrant the said sum of thirty-five dollars, with interest thereon from the first day of January, A. D. 1881."

62 (Here follows 29 counts in all respects the same as the last except as to the number of the bond to which the coupon was attached.)

"Wherefore the said plaintiffs demand judgment against said defendant for the sum of fifteen hundred and seventy-five dollars and interest thereon from the first day of January, A. D. 1881, together with the costs and disbursements of this action.

S. U. PINNEY,
Pl'ff's Att'y, Madison, Wis.

Messrs. Rogers & Rogers, St. Paul, Minn., agents.

To the above-named defendant and its attorneys:

Take notice that the bonds and coupons of which the following are true copies are the written instruments upon which the foregoing forty-five causes of action are founded and will be given in evidence on the trial of this action in support thereof, so far as the first fifteen causes of action are concerned, and that as to the remaining thirty causes of action in said complaint stated true copies of the written instrument upon which each of the same is founded is set forth in words and figures at length in each of said thirty causes of action respectively.

S. U. PINNEY,
Plaintiff's Attorney."

(Attached to said complaint are true copies of the bonds and coupons sued on, which are in the same words and figures as copy of bond and coupon attached to the complaint in this suit except as to the number of the bonds respectively and the date of payment of the coupons respectively.)

The answer (in said Exhibit "N") is in the following words and figures:

Title.

United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and CHAS. F. ILSLEY
vs.
THE TOWN OF ELGIN.

63 Said defendant answers to the complaint of said plaintiffs herein and to each and every allegation, count, and separate cause of action set forth in said complaint as follows, to wit: Defendant admits that it is, and during all the time mentioned in

the complaint has been, an organized town and municipal corporation of and within the State of Minnesota, and that the residence and citizenship of the parties to this action is as set forth in the complaint.

Defendant also admits that each and all of the pretended instruments and obligations set forth and declared upon in said complaint, and which on their face purport to be the negotiable bonds and coupons of the defendant, were made and executed by the then chairman of the board of supervisors and town clerk of the defendant, as such chairman and town clerk, and delivered to the Plainview Railroad Company, which then was and still is a railroad corporation organized under and by virtue of the statutes of the State of Minnesota, which pretended bonds and coupons were all so executed and delivered in the manner and under the authority and circumstances hereinafter stated, and not otherwise; and defendant denies that said bonds or coupons or any of them were ever made, executed, or delivered by defendant or by its authority or in any other manner save as hereinafter fully stated; and defendant denies that it or the said chairman of its board of supervisors or its town clerk were ever lawfully authorized or empowered to make, execute, or deliver said bonds and coupons or any of them, and denies that they or any of them were executed or delivered under or pursuant to authority conferred by any law of the State of Minnesota save only as hereinafter fully and particularly set out.

Further answering, defendant alleges that each and all of said bonds and coupons were so made, executed, and delivered by said chairman of the board of supervisors and said town clerk of defendant under and pursuant to the pretended authority and provisions of section seven (7) of chapter one hundred and six (106) of the General Laws of the State of Minnesota for the
64 year A. D. 1877, said chapter being an act of 1877, entitled "An act to authorize municipal corporations to aid in the construction of railroads," and by virtue of certain pretended proceedings under and pursuant to said section seven of said act, as hereinafter stated, and in no other manner and by no other authority whatever, and defendant hereby refers to said act and said section seven thereof as part of this answer; that on or about the 23d day of January, A. D. 1878, said The Plainview Railroad Company made and delivered to the then town clerk of said town (this defendant) a definite proposition in writing, signed by the president and secretary of said railroad company and sealed with its seal, containing all the statements and specifications prescribed by section four of the aforesaid act and stating the amount of bonds desired to be forty thousand dollars, and said town clerk immediately endorsed on said proposition the date of the filing thereof, and on the 22d day of January, A. D. 1878, said proposition was transcribed and recorded in the books of said town; that within three months after the said filing of said proposition with said town clerk, to wit, on the 23d day of January, A. D. 1878, said railroad company caused notice in due form to be given, posted and published as provided by said act, stating that, after the 29th day of January, A.

D. 1878 (more than five days after the date of said notice), a petition to the proper authorities of said town (this defendant) would be presented to the resident tax-payers of said town for their signatures, asking such authorities to agree to said proposition, a copy of which was attached to said notice and posted and published therewith; that within four months after said filing of said proposition with said town clerk, to wit, on the 28th day of March, A. D. 1878, said railroad company delivered to said clerk substantial copies of said proposition so filed with such petition, in matter and form as provided by said section seven of said act, appended thereto, bearing the signatures of a majority of the persons residing in said
65 town of Elgin who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll thereof, which signatures were verified by the affidavits of persons witnessing such signatures; that many of the resident tax-payers of said town whose signatures were so upon said petition were not electors or legal voters in said town or at all, some of them being women, some being minor persons, and still others being copartnership firms, paying taxes as such firms, but that said petition and the signatures thereto were made and obtained in accordance with and under and pursuant to the provisions of said section seven of the aforesaid act and not otherwise; and this defendant avers that the aforesaid section seven of said act and the aforesaid proceedings and acts thereunder constituted were and are the only basis, power, or authority ever conferred upon or obtained by the supervisors of said town or the chairman of the board of supervisors or the town clerk thereof to issue, make, execute, or deliver or direct the issuing, making, execution, or delivery of any of said bonds or coupons or any bonds or coupons whatever, and that no election was ever called or held or other proceedings of any kind ever had or attempted to authorize the supervisors of said town or any officer thereof to issue, make, or deliver or authorize the issuing, making, execution, or delivery of said bonds or coupons or any bonds or coupons except as hereinbefore fully recited.

That after said petition of resident tax-payers of said town so signed and bearing such signatures of a majority of such resident tax-payers of said town so verified and having appended thereto substantial copies of said proposition was so delivered to and was filed by said town clerk, to wit, on said 16th day of Nov., A. D. 1878, the then board of supervisors of said town, having no power or authority so to do save only as hereinbefore recited, adopted a resolution reciting in substance the proceedings hereinbefore recited and none other, and pretending to accept and agree to the said propo-
66 sition of said railroad company and to direct the issue of said bonds and coupons, according to the terms of said proposition, and to waive the issuance by said railroad company to said town of any stock of said railroad company, and declining and refusing to accept any such stock thereof, which resolution was entered on the record book of said town. True copies of said notice, proposition, petition (except the signatures and verifications of signatures of the petitioners, which are omitted because of their voluminous-

ness), and of said resolution are hereto attached and hereby referred to as a part of this answer.

Defendant further alleges that afterwards, about the first day of January, A. D. 1879, said chairman of the board of supervisors of said town (defendant) and said clerk thereof, without any other power or authority so to do save only that hereinbefore set forth, did, in pursuance of said section seven (7) of the aforesaid act and of the proceedings hereinbefore recited and not otherwise, make, execute, and deliver to said The Plainview Railroad Company, at its request, all the bonds and all the coupons in the complaint described and declared upon, and all the bonds from which all the coupons described and declared upon in said complaint have been detached; that each and all of said bonds and each and all of said coupons in the complaint set forth were and are a part of one and the same issue or series of bonds and interest coupons then and so executed and delivered as above stated and none other, being a series of eighty bonds, with interest coupons attached, each and every one of which bonds were and are of the same form and substance and contain upon their face all and the same recitals as those which are set forth in the complaint herein, and copies of which are attached to said complaint, and that all the coupons set up in said complaint were so issued, made, and delivered with and as a part of said bonds so issued for the interest to accrue thereon and not otherwise, and that all the matters and facts herein set forth are and always have been well known to and by
67 the plaintiffs herein from a time long prior to the purchase of said bonds or coupons or any of them by the plaintiffs.

That said section seven of the aforesaid statute was and is in conflict with the provisions of the constitution of the State of Minnesota, and all the said proceedings thereunder were and are void, and that it has been so held, decided, and adjudged authoritatively by the court of last resort of said State. Wherefore defendant prays that plaintiffs take nothing by this action, and that defendant may have judgment for its costs and disbursements herein.

Dated February 13th, 1881.

ROBERT TAYLOR AND A. J. EDGERTON,
Attorneys for Defendant, Kasson, Minn.

CHARLES M. START,
Of Counsel for Defendant, Rochester, Minnesota.

(Verification.)

(Attached to said answer and exhibits are copies of the "proposition," "notice," "petition," and "resolution," all of which are attached to and admitted by the pleadings in this suit.)

The reply (in Exhibit "N") is in the following words and figures:

United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and CHAS. F. ILSLEY
vs.
THE TOWN OF ELGIN.

The said plaintiffs, in reply to the new matter contained in the

answer of said defendant, deny each and every allegation thereof, except as hereinafter specially admitted, and aver that they purchased the bonds and coupons in question on the 8th day of July, A. D. 1879, for a valuable consideration and without any notice in fact of any of the matters relied on in defense of said action, except such as appears on the face of said bonds from the recitals therein contained, copies whereof in substance are annexed to
68 said complaint; that said bonds were all alike except as to the number, and were numbered from one to eighty, inclusive.

The said plaintiffs, further replying, admit and aver that, about three months after they so purchased said bonds and coupons and not before, they obtained information that section 7 of the statute mentioned in said answer had been decided unconstitutional and void by the supreme court of the State of Minnesota in the case of George W. Harrington *vs.* The Plainview Railroad Company and others, reported in volume 6 of the Northwestern Reporter, pages 777 to 781, inclusive, and to which decision the plaintiffs refer for greater certainty as to the matters decided therein and thereby; and, upon information and belief acquired as aforesaid, they aver that said action was tried upon the merits thereof and judgment entered therein March 15th, 1879, dissolving the injunction theretofore issued therein and dismissing said action.

And these plaintiffs, further replying on information and belief acquired since their said purchase as aforesaid, admit that the proceedings under and by virtue of which said bonds and coupons were issued are substantially set forth in said answer and exhibits thereto annexed, but whether any tax-payers who signed said petition were not electors or were women or minors or copartnership firms these plaintiffs have no knowledge or information sufficient to form a belief, and they admit that each and all of said bonds and coupons were and are a part of one and the same issue or series of bonds and coupons issued as aforesaid, and all of which said bonds contain upon their face substantially the same recitals as those which are annexed to the complaint herein.

S. U. PINNEY,
Plaintiffs' Attorney.

(Verification.)

The stipulations of fact in said exhibit are in the following words and figures:

United States Circuit Court, District of Minnesota.

69 SAMUEL MARSHALL and CHARLES F. ILSLEY
vs.
THE TOWN OF PLAINVIEW.

SAME PLAINTIFFS *vs.* THE TOWN OF ELGIN.

I.

It is hereby stipulated and agreed by and between the attorneys of the respective parties to these actions as follows, to wit: That all

the coupons described in the complaint in these actions are attached to or were taken from bonds of the same issue and date and of like tenor as those copies of which are annexed to the said complaint, respectively, and were purchased by the said plaintiffs with the said bonds before being detached therefrom.

II.

The printed paper book in the case of George W. Harrington against The Plainview Railroad Company *et al.* in the supreme court of Minnesota shall be put in evidence in these actions on the trial thereof as a true copy of the record in that case. The plaintiff therein (Harrington) appealed to the State supreme court from the order of the district court denying a new trial and perfected his said appeal March 12th, 1879. On March 15th, 1879, judgment was entered in and by the district court dissolving the injunction and dismissing the action, and on March 16th, 1879, the bonds in question of the town of Plainview were issued.

The decision of the State supreme court upon said appeal was made October 6th, 1880, and is reported in volume 6, Northwestern Reporter, pages 777 to 781, inclusive.

An appeal was also taken by said Harrington to said supreme court from said judgment September 12th, 1879, but it has never been brought to trial in the supreme court, and the said decision so reported as aforesaid is the only decision of said supreme court in that case.

The plaintiffs in these actions were not parties in any manner to said action of Harrington *vs.* The Plainview Railroad Company *et al.*

True copies of the propositions, notice, petition (except sig-
70 natures), and resolutions in the proceedings in each of said towns are attached to the respective answers in these actions.

III.

That the plaintiffs purchased the bonds and coupons in question July 9th, 1879, for value and without notice, in fact of any of the matters relied on in defence except such as appear upon the face of said bonds.

IV.

The only matters relied on in defence are—

First. That the provisions of chapter 106, and particularly of section 7 of chapter 106 of the General Laws of the year 1877 of the State of Minnesota under which the bonds and coupons in question were issued were and are unconstitutional and void.

Second. That the decision of the supreme court of the State of Minnesota in the said case of Harrington *vs.* The Plainview Railroad Company *et al.* is conclusive and binding in respect to said first point

upon the United States courts as an exposition and construction of the constitution of the State of Minnesota.

Dated June 20th, 1881.

ROBERT TAYLOR,
Attorney for each of said Defendants.
S. U. PINNEY,
Attorney for Plaintiffs.

United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY
vs.
THE TOWN OF PLAINVIEW.

SAME PLAINTIFFS *vs.* THE TOWN OF ELGIN.

It is agreed in these cases that all the bonds in question from which all coupons in question were detached were registered pursuant to section 143 of chapter 11 of the General Statutes of Minnesota (Young's revision of 1878).

That the State auditor, pursuant to section 145 of said chapter 11, did each year, after the issue of the bonds in question, certify to the county auditor of the county of Wabasha, in which the defend-
71 ant towns were situated, the amount of tax required to meet the annual interest accruing on said bonds; that thereupon a tax was levied and extended by said county auditor upon the taxable property in said towns to meet such interest accruing on said bonds for each of the two first years, and such taxes were collected by and paid to the county treasurer of said county in the usual manner of collecting taxes and as provided by said section 145; that with such taxes so levied and collected the one year's coupons first becoming due were paid and cancelled by said county treasurer pursuant to section 147of said chapter 11, and that the second year's coupons, of which those in suit are part, have not yet been paid.

ROBERT TAYLOR AND G. E. COLE,
Attorneys for Defendant.
S. U. PINNEY, *Plaintiffs' Attorney.*"

The statement of facts and opinion of the court in said Exhibit "N" are in the following words and figures:

"United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL *et al. vs.* THE TOWN OF PLAINVIEW
and
SAME *vs.* THE TOWN OF ELGIN.

These actions are brought to recover the amount of coupons which were attached to bonds issued by the towns of Elgin and Plainview, in this district, the plaintiffs being owners of the bonds and coupons,

and also to recover the amount of coupons owned by them taken from bonds held by other parties to whom the plaintiffs had sold them. The bonds and coupons were issued to the Plainview Railroad Company by the town of Plainview March 16th, 1879, and by the town of Elgin about January 1st, 1879, under chapter 106, General Laws of Minnesota 1877, and were purchased by the plaintiffs July 9th, 1879, for value and without notice of any of the matters relied on as defences except such as appear on their face.

Section 3 of the act referred to provides that no bonds shall be issued until a mutual agreement in relation to the construction
72 of a railroad shall have been arrived at. Section 4 enacts that a railroad company desiring aid in the construction of its road shall make a proposition in writing, which shall contain a statement of the amount of the bonds of the town desired and when they are to be delivered, which shall be filed with the auditor or clerk.

Section 7 declares that one mode of arriving at the mutual agreement required shall be—

"First. That within three months after filing a proposition the railroad company shall cause notice to be given that after a day named a petition to the proper authorities asking them to agree to such proposition will be presented to the resident tax-payers, and to the petition shall be appended a copy of the proposition. Second. If within four months after the filing of such proposition with such clerk * * * the railroad company shall deliver to such clerk a substantial copy or copies of such proposition so filed with such petition to the proper authorities of such town, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such * * * town, * * * who were assessed for taxes upon real or personal estate in such * * * town, * * * as shown by the last assessment-roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement for the issue of bonds by such municipality and of the stock of such railroad company shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds shall be issued and delivered in conformity with the true intent and meaning of such proposition and with the provisions of this act."

Each bond contains the following recital:

"This bond is issued in pursuance of a mutual agreement between said town and said railroad company, which agreement was made in accordance with the laws of the State of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor, signed by a major-
73 ity of the resident tax-payers of said town, said agreement having been fully performed by the said railroad company on its part."

"This bond is issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of said town."

In the case of the town of Plainview, at or about the time the railroad had complied on its part with the mutual agreement, one George Harrington, a tax-payer of that town, brought an action in the district court of the State against the town officers and the Plainview Railroad Company to restrain the town officers from executing and delivering the bonds as stipulated, for the alleged reason that the act under which they were issued (section 7, chapter 106, Laws of Minnesota for 1877), which provides for arriving at a mutual agreement between the railroad company and the town by proposition and petition of a majority of the resident tax-payers was unconstitutional and void. A temporary injunction was issued to restrain the execution and delivery of the bonds. The cause was tried January 27th, 1879, upon the stipulated facts, and among other things it was admitted at the trial—

"That, relying on and induced and influenced by the proceedings set out, and particularly by the resolution of the board of supervisors, the Plainview Railroad Company constructed and had before the commencement of that action its line of road constructed, and has had the same graded and the ties and iron laid thereon, with the cars running thereon from a point of junction with the Winona & St. Peter railroad, in the county of Olmsted, east of the west line of Eyota, in said county, to a point within tho corporate limits of the village of Plainview, as the same existed December 31, 1877, and had in all respects complied with the terms and conditions specified in the proposition by it to be performed."

The district court held the act valid and found for the de-
74 fendants. A motion for a new trial made by the plaintiff was denied March 11th, 1879, and he appealed from such denial to the supreme court of Minnesota on the next day. Three days afterwards judgment was entered by the district court dissolving the injunction and dismissing the action, and on the next day the town issued the bonds in question. On the 6th day of October, 1880, the supreme court of Minnesota, having heard the appeal, decided that the act under which the bonds were issued (chapter 106, section 7, Laws 1877) was unconstitutional and void.

S. U. PINNEY AND THOMAS WILSON,
For Plaintiffs.

GORDON E. COLE AND ROBERT TAYLOR,
For Defendants.

NELSON, *D. J.*:

These cases are tried without a jury. The only matters relied on in the defence are—

First. That the provisions of chapter 106, General Laws of Minnesota 1877, and particularly of section 7, under which the bonds and coupons issued were unconstitutional and void.

Second. That the decision of the supreme court of Minnesota in the case of Harrington *vs.* The Plainview Railroad Company is conclusive and binding in respect to the first point, upon the Federal courts as an exposition and construction of the constitution of the State of Minnesota.

The view taken by the court will render it necessary to consider only the second defence urged. The following propositions must control the decision:

First. The recitals in the bonds are conclusive evidence in favor of the plaintiffs, who purchased without other information than that which appears upon their face, that all the conditions precedent prescribed in the law had been complied with.

Second. If the law under which the bonds issued had been sustained and recognized as valid by the highest court of the
75 State at the time, no subsequent act of the judiciary can impair their validity in the hands of the plaintiffs. The bonds on their face refer to the law under which power to issue them was given by the Legislature, and the coupons, although detached, are described with sufficient certainty in the complaint, and the evidence is plain that they belong to the bonds issued. If the bonds are valid obligations the coupons are identified and follow the bonds, so that if the second proposition can be applied the plaintiffs are entitled to recover.

In State *ex rel. vs.* Town of Highland, 25 Minn., 355, a case arose under the act of 1877, and section 7 was before the supreme court of the State. Proceedings for a mandamus to compel the Town of Highland to comply with the mutual agreement entered into as proscribed by this section were instituted, and on motion to quash the alternative writ, which had issued, the respondent's counsel presented and urged, in a written brief, among other things, the following, as appears by the records on file, but not given in the report of the case, viz:

"Fourth. Because the act of 1877, c. 106, in so far as it attempts to empower a majority of the tax-payers of a town, by means of a petition, to enter into and bind the town by agreement, is unconstitutional and void."

The court in its decision, after citing the principal provisions of the act, says:

'We think the following propositions clearly deducible: First, the statute authorizes a town to aid the construction of railroads. It does not authorize aid to roads already constructed. The idea of the law-maker unquestionably was to authorize aid to be given to roads which were believed to require aid to secure their construction and not to roads which had been constructed without such aid.

Second. The aid is to be rendered by the making of a mutual agreement between the town and the railroad company, by which the town is legally bound to issue its bonds to or for the use
76 of the company upon performance by the latter of its part of the agreement and by the issue of bonds accordingly.

Third. Until the mutual agreement is arrived at and perfected, as provided in section 7, no legal liability or obligation whatever is imposed upon or incurred by the town in the premises. In other words, unless an agreement is arrived at and perfected as there provided all steps which may have been taken with the intent of arriv-

ing at and perfecting one or looking in that direction are absolute nullities.'

Here was a recognition, in my opinion, of the validity of this law and a full and comprehensive construction of the section. It is true the court did not consider the constitutional question, but the decision did not express a doubt, and at least favored its validity. This decision was rendered January 10th, 1879, and at that time the bonds, with the coupons, in suit of the town of Elgin had been issued and were in the market as commercial securities. The Plainview Railroad Company had also entered into an agreement with the town of Plainview and by the construction of its road was entitled to receive town bonds, when a suit was commenced in the district court of the State by a tax-payer and citizen of the town, entitled Harrington *vs.* The Town of Plainview *et al.*, to enjoin and restrain their issue, and a preliminary injunction issued. This suit was subsequently tried, and the action was dismissed by the court and the injunction dissolved, and the town issued its bonds. An appeal to the supreme court of the State was taken by Harrington, and, among other things, it was argued on the hearing that section 7 of the act was unconstitutional, and it was so declared by the court. It is insisted that this decision of the highest court of the State is binding and the defendants entitled to judgment. Such is not my opinion. The Federal courts, it is true, generally follow the adjudications of the highest courts of the State in the construction of its statutes, but exceptions are recognized, and these cases fall within the rule laid down in The City *vs.* Lamson, 9 Wall., 477, 77 which is, briefly, where a decision of the highest judicial tribunal at the time the bonds issued favors the validity of the law under which they were issued a subsequent decision impairing their validity will not be followed to the prejudice of *bona fide* holders.

To the same effect is Douglas *vs.* Pike Co., 101 U. S., 687:

"We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

See collated authorities in Dillon on Municipal Corporations.

The question, as stated by the court in that case, is not so much whether the last decision was right as whether it should be followed. These bonds, having been purchased by the plaintiffs before the decision of the Harrington case, and — no previous expression by the court other than that contained in State *vs.* Town of Highland, are 'clear obligations to pay,' not affected by the last decision. It is urged that the bonds are invalid in the plaintiffs' hands by the fact that they were purchased during the pendency of the suit in which the law was held to be unconstitutional. The answer to this proposition is that the plaintiffs were not parties to and had no knowledge of that suit, and that the rule that all persons are bound to take notice of a pending suit does not apply to negotiable securities. (97 U. S., 96.)

The plaintiffs are entitled to judgement in each case, and it is so ordered.

McCRARY, *C. J.:*

I concur in the conclusions reached in the foregoing opinion, as well as in the reasons by which they are supported.

Filed September 27th, 1881.

H. E. MANN, *Clerk.*

The order for judgment is in the following words and figures:

78 Title.

"United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL *et al. vs.* THE TOWN OF ELGIN.

This cause having been heretofore tried before the court without a jury and submitted and by the court taken under advisement, and the court having fully considered the same, filed its written decision and opinion, it is ordered that judgment in favor of the plaintiffs and against the defendant be entered pursuant thereto.

Judgment is in the following words and figures:

Facts.

"United States Circuit Court for the District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY
vs.
THE TOWN OF ELGIN.

The issues joined in this action came on to be tried before the court without a jury, before the Hon. G. W. McCrary, circuit judge, and the Hon. R. R. Nelson, district judge, holding the court. A trial of said issues by jury having been duly waived by a stipulation in writing, on file herein, and the court, having heard the evidence and the arguments, finds as facts:

First. That the bonds and coupons mentioned in the complaint were duly issued by the defendant on the 1st day of January, A. D. 1879, to the Plainview Railroad Company under and pursuant to chapter one hundred and six of the General Laws of Minnesota for 1877, and were purchased by the plaintiffs July 9th, 1879, for value and without notice of any of the matters relied on as defences, except such as appear on the face of such bonds, copies whereof are annexed to the complaint, and that the plaintiffs still own the same, and that the amount due on said bonds and coupons and sued for in this action is the sum of one thousand six hundred and sixty dollars and seventy-five cents ($1,660.75).

Second. The said bonds and coupons were issued in pursuance of a mutual agreement between said defendant and the said Plainview Railroad Company, arrived at pursuant to the provisions of

section seven of said chapter one hundred and six, by which
79 said town was to aid in the construction of the railroad of said company by an issue of its bonds in the sum of forty thousand dollars, in consideration of which said company undertook and agreed to construct its railroad from the Winona and St. Peter railroad to a point within the village of Plainview, which was fully complied with on the first day of November, A. D. 1878, by said railroad company, and were so issued pursuant to a resolution of the board of town supervisors of said town passed November 16th, A. D. 1879.

Third. At or about the time said agreement was so complied with one George Harrington, a tax-payer of the town of Plainview, in said county, brought an action in the district court of Minnesota for Wabasha county against the supervisors and town clerk of said town of Plainview and the Plainview Railroad Company to restrain the town officers from issuing and the railroad company from receiving said bonds as stipulated, alleging that the act under which they were issued (section 7, chapter 106, General Laws of Minnesota 1877) was unconstitutional and void, and a temporary injunction was issued to restrain the execution and delivery of the bonds. A trial of the action upon stipulated facts was had January 27th, 1879, and among other things it was admitted that, relying on and induced and influenced by the proceedings set out, and particularly by the resolution of the said board of supervisors, the Plainview Railroad Company constructed and had before the commencement of that action its line of road constructed, and has had the same graded and the ties and the iron laid thereon, with the cars running thereon, from a point of junction with the Winona and St. Peter railroad in the county of Olmsted east of the west line of Eyota, in said county, to a point within the corporate limits of the village of Plainview as the same existed December 31, 1877, and had in all respects complied with the terms and conditions specified in the proposition by it to be performed. The district court held the act
valid and found for the defendants. A motion for a new
80 trial, made by the plaintiff, was denied March 11th, 1879, and from such denial he appealed on the next day to the supreme court of Minnesota. Three days afterwards judgment was rendered for the defendants, dissolving the injunction and dismissing the action. On the 6th day of October, 1880, after the plaintiffs had so purchased said bonds and coupons, the supreme court of Minnesota, having heard the appeal, decided that section 7 of said chapter 106, under which said bonds and coupons were issued, was unconstitutional and void.

About two months after the plaintiffs purchased said bonds and coupons the plaintiff in said action appealed from the final judgment therein, but such appeal has not been heard or determined. The plaintiffs in this action were not in any manner parties of said action of Harrington *vs.* The Plainview Railroad Company *et al.*

Fourth. Before the plaintiffs purchased said bonds and coupons the case of the State *ex rel. vs.* Highland, 25 Minn., 355, under section seven of said chapter 106, had been determined by the supreme

court of Minnesota, and in that case it was insisted by the respondent's counsel that the alternative writ of mandamus should be quashed, 'Because the act of 1877, chapter 106, in so far as it attempts to empower a majority of the tax-payers of a town by means of a petition to enter into and bind the town by agreement, is unconstitutional and void.'

Fifth. All the bonds in question, and from which all coupons in question were detached, were registered pursuant to section 143 of chapter 11 of the General Statutes of Minnesota (Young's revision of 1878). The State auditor, pursuant to section 145 of said chapter 11, did each year after issue of the bonds in question certify to the county auditor of the county of Wabasha, in which the defendant town is situated, the amount of tax required to meet the annual interest accruing upon said bonds; thereupon a tax was levied and extended by said county auditor upon the taxable property in said town to meet such interest accruing on said bonds for each of the first two years, and such taxes were collected by and paid to
81 the county treasurer of said county in the usual manner of collecting taxes and as provided by said section 145. With such taxes so levied and collected the one year's coupons first becoming due were paid and canceled by said county treasurer pursuant to section 147 of said chapter 11, and the second year's coupons, of which those in suit are part, have not been paid. True copies of the proposition, notice, petition (except signatures), and resolutions in the proceedings of the town of Elgin to issue said bonds are attached to the defendant's answer.

Sixth. The only objections made to the plaintiffs' recovery are—

First. That the provisions of chapter 106, General Laws of Minnesota of 1877, and particularly of section 7, under which the bonds and coupons issued, are unconstitutional and void.

Second. That the decision of the supreme court of the State of Minnesota in the case of Harrington *vs.* The Plainview Railroad Company *et al.* is conclusive and binding in respect to the first point upon the Federal courts as an exposition and construction of the constitution of the State of Minnesota.

And the court now being sufficiently advised of and concerning its opinion herein, now, on motion of S. U. Pinney, attorney for the plaintiffs, it is considered and adjudged that the said plaintiffs, Samuel Marshall and Chas. F. Ilsley, do have and recover against the said defendant, The Town of Elgin, the said sum of one thousand six hundred and sixty dollars and seventy-five cents, their damages aforesaid, together with the sum of thirty-six dollars and ten cents for their costs and disbursements in this action, amounting in the whole to the sum of one thousand six hundred ninety-six dollars and eighty-five cents, and that they have execution therefor according to law.

Judgment record signed this 11th day of October, 1881.

H. E. MANN, *Clerk.*"

82 To the admission of said Exhibit N or of any item or part thereof the defendant's counsel objected as incompetent,

irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

Plaintiff's counsel thereupon offered in evidence certified copy of judgment record of circuit court of U. S. for district of Minnesota (marked Exhibit O) in a suit brought by Marshall and Ilsley against said town on 35 of said coupons, the complaint of which was in the following words and figures:

Title.

The complaint of the above-named plaintiff respectfully shows to the court that they are citizens of the State of Wisconsin, and that the above-named defendant, The Town of Elgin, is a body politic and corporate, created and existing under and by virtue of the laws of Minnesota, and is a citizen of said State, and for a cause of action against the defendant the said plaintiff alleges—

That the said defendant, being thereto duly authorized by the laws of the State of Minnesota, on or about the first day of January, A. D. 1879, made and executed, for value received, its negotiable coupon or interest warrant, duly signed by the chairman of its town board of supervisors and by its town clerk, of which coupon or interest warrant the following is a copy, to wit:

$35. $35.

The Town of Elgin will pay to the holder hereof, on the first day of January, 1881, at the office of the treasurer of the State of Minnesota or at such other place in said State as is or may be designated by law, thirty-five dollars for one year's interest on bond No. 1.

D. F. FURGUSON, *Chairman.*
R. H. GOULD, *Town Clerk.*

That said coupon or interest warrant was, on or about the first day of January, A. D. 1879, duly delivered with said bond, which the said defendant then duly issued, under and by virtue of the laws of the State of Minnesota, to the Plainview Railroad Company,
83 a corporation created and existing under the laws of the State of Minnesota, and the said plaintiffs are now the lawful owners and holders of said coupon or interest warrant, and that the said defendant has not paid the said sum of thirty-five dollars therein specified at the office of the treasurer of the State of Minnesota or at any other place designated by law or elsewhere, although requested so to do, but to pay the same or any part thereof the said defendant hitherto wholly refused and doth still refuse; that there is now due and unpaid to said plaintiff on the coupon or interest warrant the said sum of thirty-five dollars, with interest thereon from the first day of January, A. D. 1881.

(Here follow 34 counts in the same words and figures except as to the No. of the bond to which the coupon sued on was attached.)

Wherefore the plaintiff demands judgment against the said defendant for the aggregate of said coupons or interest warrants,

amounting in all to one thousand two hundred and seventy-five dollars, with interest thereon at the rate of seven per cent. per annum from the first day of January, A. D. 1881, together with the costs and disbursements of this action.

S. U. PINNEY,
Plaintiff's Attorney.

Messrs. Rogers & Rogers, agents at St. Paul, Minnesota.

The above-named defendant and its attorneys will take notice that the complaint in the foregoing action is founded on thirty-five coupons or interest warrants, copies of which are contained in the causes of action stated in said complaint, numbered from first to thirty-fifth, inclusive, and that upon the trial coupons or interest warrants, of which copies are set forth in words and figures, at length, in said cause of action, will be given in evidence in support of said complaint.

Yours, etc.,

S. U. PINNEY,
Plaintiff's Attorney.

Complaint endorsed: Filed November 1, 1881. H. E. Mann, clerk.

84 The answer is in the following words and figures:

Title.

The said defendant, for answer to the complaint herein and to each and every separate count of cause of action therein, denies each and every allegation thereof except only such as are hereinafter admitted.

It admits that it is and during all the time in the complaint mentioned has been a body politic and municipal corporation of and within the State of Minnesota, and that plaintiffs are residents and citizens of the State of Wisconsin.

Defendant admits and alleges that each and all of the pretended coupons and obligations set out and declared upon in the complaint were made and signed by the then chairman of the board of supervisors of defendant and its town clerk, and delivered to the Plainview Railroad Company (a corporation organized under and by virtue of the laws of the State of Minnesota), attached to, in connection with, and as a part of the pretended bonds hereinafter recited and described, and in the manner and under the authority and circumstances hereinafter stated, and not otherwise; and defendant admits and alleges that the plaintiffs are the owners and holders of all of said pretended coupons, and also of a large number of said pretended bonds so made and delivered with and as a part of said coupons, which bonds and coupons so owned and held by the plaintiffs amount in the aggregate to more than ten thousand dollars upon their face and were and are part and parcel of one and the same issue and series of bonds and coupons, and were all made and delivered at one and the same time, for the same purpose, and in the

manner and under the circumstances hereinafter set out, and not otherwise; and this defendant expressly denies that it executed or delivered any of said bonds or coupons, and denies that either it or the said chairman of the board of supervisors or its said town clerk were ever lawfully authorized or empowered to execute or deliver said bonds or coupons or any of them, and denies that any of them were executed or delivered under or pursuant to any lawful authority or in any manner save as hereinafter fully stated.

Further answering, defendant alleges that *in* each and all of said bonds and coupons, including all those declared upon in the complaint, were made and delivered by said chairman of the board of supervisors and said town clerk of defendant under and pursuant to the pretended authority and provisions of section seven (7) of chapter one hundred and six (106) of the General Laws of the State of Minnesota for the year 1877, being an act of the Legislature for the State of Minnesota, approved March 5th, A. D. 1877, entitled "An act to authorize municipal corporations to aid in the construction of railroads," and by virtue of certain proceedings thereunder had as hereinafter stated, and not otherwise.

That on or about the 22d day of January, 1878, said The Plainview Railroad Company made and delivered to the town clerk of defendant a proposition in writing, a true copy of which is hereto attached, marked Exhibit A, and is hereby referred to as a part of this answer, which proposition was filed in the office of said town clerk and transcribed into the records of said town; that on the 22nd day of January, A. D. 1878, said railroad company caused the notice to be given, posted, and published as prescribed by section seven of said act, a copy of which notice is hereto attached, marked Exhibit "B," and is hereby referred to as part of this answer

That on the 20th day of March, A. D. 1878, said railroad company delivered to said town clerk substantial copies of said proposition, and appended thereto a petition, in matter and form as provided by said section seven (7) of said act, asking the proper authorities of defendant to agree to said proposition, having the signatures of a majority of the persons then residing in said town of Elgin who were assessed for taxes upon real or personal property in said town, as shown by the last assessment-roll thereof, which signatures were verified by the affidavits of persons witnessing the same, a copy of which petition (omitting only the signatures and the verification thereof) is hereto attached, marked Exhibit "C," and is hereby referred to as part of this answer; that a large number of such petitioning tax-payers were neither electors nor legal voters of said town at all.

That the said section seven of the aforesaid act and the aforesaid proceedings thereunder constituted and were and are the only basis, power, or authority ever conferred upon or obtained by defendant or the chairman of the board of supervisors or its town clerk to issue, make, and deliver said bonds or coupons or any of them, or any bonds or coupons whatever, and that no election was ever called or held or other proceedings of any kind ever had or attempted to authorize this defendant or its supervisors or any of its officers to issue,

make, or deliver said bonds or coupons or any of them, or
86 any bonds or coupons whatever, except as hereinbefore fully recited; that in fact and in law said section seven (7) of said act and all the aforesaid proceedings under and pursuant to the same were and are unconstitutional and void and have been so adjudged by the court of last resort of said State of Minnesota, to wit, by the supreme court thereof, and that no power or authority was vested or conferred by the same upon defendant or any of its officers.

Defendant further alleges that about the first of January, 1879, without any authority, right, or power so to do and under and pursuant to said unconstitutional statute and proceedings alone, the then chairman of defendant's board of supervisors and its town clerk did make and deliver to said railroad company, at its request, eighty bonds of five hundred dollars each, purporting to be the bonds of this defendant, each with interest coupons attached, including all the coupons set out and declared upon in the complaint, said bonds numbered, respectively, from 1 to 80, and each coupon referring on its face to the number of the bond to which attached, each and every of which bonds bears date on the first day of January, A. D. 1879, and purports to be the obligation of defendant to pay to said railroad company or bearer, on or before twenty years after said date thereof, the sum of five hundred dollars, and each and every bond being of the same form, substance, and import and having upon its face the same recitals, and, among other things, full recitals that they and each of them were so issued under and pursuant to the provisions and authority of said constitutional section of said statute and said invalid proceedings thereunder; that a true copy of one of said bonds is hereto attached, marked Exhibit D, and is hereby referred to as a part of this answer, and that all of the balance of said bonds were and are of the same form, tenor, and substance and contain the same recitals; that in addition to the coupons set out and declared upon in the complaint herein plaintiffs have come before the commencement of this action and still are the owners and holders of a large number, to wit, over twenty-five, of said pretended bonds so issued and delivered therewith, amounting in all to over ten thousand dollars, the liability of defendant upon which and upon each of which is to be and will be adjudicated and determined by this action.

Defendant further alleges, upon information and belief, that plaintiffs took and became the owners and holders of all the
87 coupons in question long after said judgment and decision of said supreme court of said State, and with full knowledge thereof and of all the matters and facts hereinbefore recited. Defendant further shows that, in and by proceedings and actions duly instituted and had in and by the district court of said State in and for said Wabasha county long before the commencement of this action, said State court had, by its judgment duly rendered, made, and entered and now in force, duly enjoined the payments of any and all said bonds and coupons and the levy of any tax for that purpose.

Wherefore the defendant prays that the plaintiffs may take noth-

ing by this action, and that the defendant may have judgment herein for its costs and disbursements.

GORDON E. COLE AND ROBERT TAYLOR,
Attorneys for Defendants.

Attached to the answer are copies of "petition," "notice," "proposition," and one of said bonds and coupons, copies of all of which are attached to and admitted by the pleadings in this action.

The reply (in said Exhibit O) is in the following words and figures:

Title.

The above named plaintiffs, in reply to the answer of the said defendants, deny each and every allegation and statement of new matter therein contained, and aver that they purchased the bonds and coupons in question on the 9th day of July, A. D. 1879, for a valuable consideration by them then paid therefor, and without notice or knowledge of any of the matters relied on in said answer in defence of said action, except such as appears on the face of said bonds, of one of which said Exhibit "D," annexed to said answer, is substantially a copy.

S. U. PINNEY,
Plaintiffs' Attorney.

Endorsed: Filed November 29th, 1881. H. E. Mann, clerk.

88 Title.

The said plaintiffs, in reply to the new matter contained in the answer of the defendant, deny each and every allegation thereof, except as hereinafter specially admitted, and aver that they purchased the coupons in question, with the bonds to which the same were attached, on the 8th day of July, A. D. 1879, for a valuable consideration and without any notice in fact of the matters relied on in defense of said action, except such as appears on the face of said bonds, and that they were all alike, except as to number, and were numbered from one to eighty, inclusive. They admit that at the time of the commencement of this action they owned and still own fifteen of the bonds of the series of five hundred dollars each, and no more, but deny that they then owned or now own any or either of the bonds from which the coupons mentioned in the complaint or any or either of them were taken.

The said plaintiffs, further replying, admit and aver that about three months after they so purchased said bonds and coupons they obtained information that the supreme court of Minnesota had, on the 6th day of October, 1880, declared said section seven (7) of said act unconstitutional and void, which said decision was rendered in the case of George W. Harrington against The Plainview Railroad Company and others and reported in volume 6 of the Northwestern Reporter, pages 777 to 781, inclusive, and to which decision plaintiffs refer for greater certainty as to the matters decided therein and

thereby, but deny that these plaintiffs were in any way parties to said action or to any of the judicial proceedings referred to in said answer; that on the first day of January, A. D. 1879, pursuant to a resolution of the board of supervisors of said defendant town, duly adopted on the 16th day of November, 1878, said bonds and coupons were regularly issued to the said Plainview Railroad Company, under and pursuant to the provisions of chapter 106 of the General Laws of Minnesota for the year 1877 and the proceedings under the same mentioned and referred to in said answer, as the said town had full power and lawful authority to do, pursuant to the laws of the State of Minnesota and the decision of its supreme court previously made in respect to the provisions of said statute, and said bonds and coupons were duly made and signed, pursuant to the authority aforesaid, by the then chairman of the board of supervisors of said town and its town clerk, as these plaintiffs are in-
89 formed and believe; and these defendants, further replying, admit that actions were instituted and had in the district court of said State for Wabasha county, before the commencement of this action, in which the county treasurer of said county was enjoined from paying any of said bonds or coupons and the county auditor enjoined from levying any tax for that purpose, but these plaintiffs deny that they were parties to said actions or either of them in any way or manner whatever; and, on information and belief, these plaintiffs admit that no election was ever called or held to authorize the defendant town or its supervisors or officers to issue, make, or deliver said bonds or coupons or any of them.

S. U. PINNEY,
Pl'ffs' Att'y.

Verification.

And judgment in said exhibit is in the following words and figures:

Title.

This cause coming on for trial, the plaintiffs appeared by S. U. Pinney, Esq., and the defendant by Gordon E. Cole, Esq., whereupon a jury, being called, came, to wit, John C. Quimby, J. M. Bohrer, Adolph Paar, Wm. Nettleton, Wm. D. Rogers, Charles Heidicker, Edward Miller, Conrad Peters, J. J. Piener, F. A. Fogg, N. B. Farrell, G. J. Hopping, who are duly impannelled and sworn. The plaintiffs, by leave of the court, withdraw the twenty-fourth cause of action set out in their complaint herein. S. U. Pinney, Esq., opens the case for the plaintiffs. Plaintiffs introduce documentary evidence. S. U. Pinney is sworn and examined as a witness for plaintiffs.

Plaintiffs rest.

Charge is given to the jury by the court, who, without leaving their seats, say they find a verdict for the plaintiffs and assess their damages at $1,416.01.

Wherefore it is by the court considered, ordered, and adjudged

that the plaintiffs do have and recover of and from the defendant the said sum of one thousand four hundred sixteen dollars and one cent, their damages aforesaid, in manner and form aforesaid assessed, besides their costs by them in and about their suit in this behalf expended, to be taxed.

Judgment-roll signed this 10th day of January, A. D. 1883.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Dep.*

90 To Exhibit O and to each item and part thereof defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted. Plaintiffs' counsel thereupon offered in evidence certified copy of judgment record in last-mentioned court (marked Exhibit "P") in a suit between the same parties named in Exhibit O on 75 of said coupons. Complaint is in all respects the same as in Exhibit O, except as to the number of the bonds to which the coupons sued on were attached. In the last suit judgment was entered by default June 7th, 1883, for $2,709.52 damages and $35.60 costs; to which defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

Plaintiffs' counsel thereupon offered in evidence certified copy of judgment record in last-mentioned court (marked Exhibit Q) between same parties on 88 of said coupons, in which judgment was entered by default on Feb. 4th, 1884, for $3,137.12 damages, and costs, $48.70; to the admission of which defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The record in said Exhibit Q was in all respects the same as that in Exhibit P, except as — the number of the bonds to which the coupons sued on were attached. Plaintiffs' counsel thereupon offered in evidence certified copy of judgment record (marked Exhibit R) in last-mentioned court between last-mentioned parties on 80 of said coupons, in which judgment was rendered by default the 3rd day of February, A. D. 1885, for $2,820.41 damages and $45.55 costs.

To which defendant's counsel objected as incompetent, irrelevant, and immaterial, and the court overruled the objection and received the evidence; to which ruling defendant's counsel duly excepted. The record in Exhibit R is identical with the record in Exhibit Q, except as to the number of the bonds to which the coupons sued on were attached and the number of coupons and the date at which they grew due.

91 The plaintiffs' counsel thereupon offered in evidence another certified copy of same court (marked Exhibit S) in a suit between the last-mentioned parties on 75 of said coupons, in which issue was joined. The record in Exhibit S is the same in all respects as that in Exhibit O, except as to the number of the bonds to which the coupons sued on were attached and the number

of coupons in suit and the date at which they grew due. Judgment was rendered in the last case on the 10th day of January, A. D. 1883, for $2,813.85.

To the admission of Exhibit S the defendant's counsel objected on the ground that it is incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The defendant's counsel refers to the said Exhibits E, N, O, P, Q, R, S, and to each of them as a part of this case to be referred to on any motion or in any subsequent proceedings in this suit.

Plaintiffs' counsel thereupon offered in evidence chapter 414 of the Special Laws of Minnesota for the year A. D. 1881, set up and pleaded in the complaint, which is herein referred to as part of this case; to which the defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence, and defendant's counsel duly excepted to such ruling. Said act is correctly set forth in the findings herein.

Plaintiffs' counsel thereupon offered in evidence the deposition of C. T. Benedict, a copy of which is hereto annexed and marked Exhibit "T."

92 Plaintiffs' counsel thereupon offered in evidence the deposition of Charles F. Ilsley, a copy of which is hereto annexed and marked Exhibit "U."

Plaintiffs' counsel thereupon offered in evidence stipulation as to payment of certain judgments, a copy of which is hereto annexed and marked Exhibit "Z," and thereupon rested.

This was all the evidence offered by the plaintiffs.

Defendant's Evidence.

The defendant's counsel then called as a witness CHARLES J. STAUFF, who testified as follows:

"Q. You are clerk of this court?

A. Yes, sir.

Q. You have been for how many years?

A. About 14 years.

Q. As such clerk you have custody of all the records of this court?

A. Yes, sir.

93 Q. Were you present yesterday when the counsel for the plaintiffs in this case offered in evidence in this court the records and files in the case of Harrington against The Plainview Railroad Company and others?

A. Yes, sir.

Q. You were?

A. Yes, sir.

Q. Were all the records and files which existed in that case in your court then offered?

A. Yes, sir.

Q. Were there any other papers, records, or files in your office in

that case save those which you handed to the opposite counsel and which were offered in evidence by them last evening?

A. None whatever.

Defendant's counsel thereupon called as a witness GEORGE W. HARRINGTON, who testified as follows:

Direct examination by Mr. WILSON:

Q. Mr. Harrington, what time in the year did they commence the building on the Plainview railroad?

A. I think it was some time in the fore part of the summer of 1858.

Q. Wasn't it early in the spring some time?

A. Some time after March.

Q. 1858 or 1878?

A. 1878.

Q. After March, you think?

A. Yes, sir.

Q. Did they not commence just as soon as the frost was out of the ground?

A. I could not tell you.

Q. What is your best recollection?

A. My best recollection is in the fore part of the summer.

Objected to as immaterial.

Mr. WILSON: I will tell the object. In January, 1878, a
94 proposition was made to the people of this town—these two towns—by the Plainview Railroad Company that the company would build a road from a given point on the Winona and St. Peter railroad at Eyota to a given point in the village of Plainview (the road running through the village of Elgin and town of Elgin) within a given time and in a given manner if bonds should be voted. I wish to show that after that time the company took steps right along according to the law; that early in the spring it commenced building that road, and that within the time it was built and completed and the law was in all respects complied with, and that until the last dollar was spent there was nothing said or done by any resident of either town. Now, I want to show by this witness one thing, to wit, when they commenced to turn the soil.

Mr. DAVIS: You have shown that.

Mr. WILSON: That is all I want. I understand you they commenced very soon after the frost was out of the ground?

A. Some time early in the summer.

Q. According to your best recollection?

A. We had some struggle in the board of supervisors at the March meeting.

Q. And very soon after that they commenced to grade?

A. Yes, sir.

Q. And they kept along grading until they finished?

A. Yes, sir.

Mr. DAVIS: I object. I move to strike out that answer.

Mr. WILSON: I want to prove just what I have proven by this witness, that they commenced at that time and kept right along."

Defendant's counsel then offered in evidence the depositions of Albert Keep, George W. Van Dusen, and Terrill Thomas, copies of which are hereto annexed, marked, respectively, Exhibits "1," "2," and "3."

Thereupon defendant rested.

95 This was all the evidence offered or received in the case.

The case was thereupon submitted to the court (without a jury), who thereafter filed his findings and decision, a copy of which is hereto annexed, marked Exhibit "4."

The defendant's counsel thereafter moved the court to amend his findings and to make the same more specific and definite and to find farther as follows, viz:

Notice of Motion to Make Additional and More Specific Findings.

District Court, Waseca County.

THE TOWN OF ELGIN
ag'st
THE WINONA & ST. PETER RAILROAD COMPANY.

"SIRS: Please take notice that on the pleadings in this action and on the findings of the court herein the defendant will make a motion before the Honorable L. W. Collins, the judge who tried this case, at a special term of court to be held by him in the city of St. Cloud, in said State, on the 24th day of April, A. D. 1886, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the said judge make his findings in this action more full and specific, and that he make and file additional findings herein as follows, viz: That he find particularly and fully whether the matters and facts alleged in that subdivision of the answer numbered ten or what, if any, of such matters or facts are true as therein alleged.

Second. Whether the matters and facts and what, if any, of the matters and facts alleged or set out in subdivision eleven of the said answer are true as therein alleged.

Third. Whether George W. Van Dusen, as president of the Plainview Railroad Company, acting for and on behalf of said company, on or about the 10th day of May, 1878, entered into a contract with the Chicago and Northwestern Railway Company, a copy of which is attached to the deposition of Albert Keep, a witness examined in this action.

Fourth. Whether, in pursuance of the said contract and of the petition of the resident tax-payers of said town and of the

96 action of the board of supervisors of said plaintiff town, as found by the court herein the Chicago and Northwestern Railway Company advanced any, and, if any, how much, money to aid in the building of the said line of road of the said Plainview

Railroad Company, and if any such money was advanced when, and whether such money so advanced, if any, was used in the building of the said line of road of the said Plainview Railroad Company.

Fifth. And, if said Chicago and Northwestern Railway Company advanced such money for the purpose aforesaid, whether it did so relying on the bonds of the plaintiff town and on the security thereof and its right thereto; and whether it, the said Chicago and Northwestern Railway Company, was induced and influenced to advance such money to aid in building said road by the contract of said Van Dusen and by the action of the officers of said town and the petition of the resident tax-payers of said town aforesaid; and whether the officers of the said Chicago and Northwestern Railway Company, when it obtained said bonds, believed that it had a legal right thereto, and that the law under which they were issued was constitutional and valid.

Sixth. Whether after the making of said contract by and between said Van Dusen and the Chicago and Northwestern Railway Company on the 10th day of May, 1878 (if such contract was made), the said George W. Van Dusen acted in all he did about the building of the Plainview railroad and in and about the obtaining and forwarding of said bonds under the said contract made as aforesaid; and whether in obtaining said bonds and delivering them he intended to and believed it was his duty to obtain the same for and deliver the same to the said Chicago and Northwestern Railway Company; and whether he believed that the said Chicago and Northwestern Railway Company was entitled to the same under its contract aforesaid and on account of the advancement of money by it, made as aforesaid; and whether at the time of obtaining and delivering said bonds he, said Van Dusen, believed that they had been legally earned, and that they were legally issued, and that the law under which they were issued was constitutional and valid, and that the Chicago and Northwestern Railway Company was entitled to them.

97

Seventh. Whether the line of road of the Plainview Railroad Company was in process of construction for a long time prior to the time when said bonds were issued, and whether it was during all said time well known by the officers of the plaintiff town and generally by the residents and tax-payers of the said town, and whether the fact was that said road was being built and money advanced to aid in the building thereof on the faith of the aid promised thereto by the plaintiff town and other towns along its line, and whether until after said road was fully completed any objection was made by any resident of the plaintiff town, or by any one, to the issuance of said bonds of plaintiff town.

THOMAS WILSON,
Defendant's Attorney.

To Hon. C. K. Davis and Kellogg and Eaton, plaintiff's attorneys."

Which motion, after hearing argument of counsel for the re-

spective parties thereon, was submitted to the court and overruled and denied by the court as follows, and exception was taken to such refusal by an order in the words and figures following:

STATE OF MINNESOTA, *Wabasha County:*

In District Court.

THE TOWN OF ELGIN *vs.* W. & ST. P. R. R. Co.

"A motion having been made by the defendant in the above-entitled action that further and additional findings be made and filed therein, and said motion having been duly argued and submitted, it is now ordered—

That said motion as a whole and in detail is hereby denied.

Further and additional findings, as requested, are refused
98 for several reasons, and among others that said matters are in part immaterial and in part have been passed upon in findings already made.

To which refusal to so make and file the counsel for the defendant then duly excepted, and to which refusal to find and state which of said requests were deemed immaterial and for that reason denied said counsel duly excepted.

Dated April 24th, 1886.

By the court:

L. W. COLLINS, *Judge.*"

And thereupon the counsel for the respective parties stipulated as follows:

Stipulation.

"It is hereby stipulated that the proceedings as to allowing additional and more specific findings were had and the action of the court thereon was as above stated, and that the same may be incorporated into the case herein and considered on the motion for a new trial and on all subsequent proceedings herein without any farther or other act or without any affidavit or other proof or evidence of such proceedings.

KELLOGG & EATON AND C. K. DAVIS,
Plaintiff's Attorneys.

THOMAS WILSON, *Defendant's Attorney.*

99 EXHIBIT "A."

Stipulation.

District Court, Wabasha County, State of Minnesota.

THE TOWN OF ELGIN
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted in each and both of the

above-entitled actions that the Chicago and Northwestern Railway Company sold all of the bonds in question of the plaintiff towns above named to T. Thomas, of Baraboo, in the State of Wisconsin, for the price of eighty per cent. of their par or face value, he being the man named Thomas referred to in the deposition of Charles F. Illsey in these suits.

Second. It is also further admitted and stipulated in each and both of the above-entitled actions that the terms and provisions of the statute under which said bonds were issued were in all respects conformed to and complied with by the Plainview Railroad Company, and that the "proposition" submitted under said statute was in all respects complied with, and that the said Plainview Railroad Company had prior to the issuance of said bonds earned and become entitled to the same if the law authorizing their issue was constitutional; but it is also admitted that there was no election or vote of the electors of said towns or of either of them authorizing the issue of said bonds or any vote by the electors upon the "proposition" therefor, but that the proceedings had were by and in pursuance of a petition of a majority of the tax-payers of said town as provided in said statute.

Third. It is further stipulated and admitted that no issue shall be raised as to the value of the property and franchises of the Plainview Railroad Company transferred to the defendant, but that
100 if the plaintiffs or either of them recover judgment against the defendant no question shall be made by the defendant, but that the property conveyed and deeded to defendant by the Plainview Railroad Company was and is in value equal to the judgment so obtained, it *is* being conceded for the purpose of this action that the value of the property was and is equal to amounts claimed in the complaint.

THOMAS WILSON, *Attorney for Defendant.*
C. K. DAVIS AND KELLOGG & EATON,
Plaintiff's Attorneys.

101 EXHIBIT "B."

Plainview Railroad Company to Winona & St. Peter Railroad Company.

This indenture, made this 11th day of May, A. D. 1881, by and between the Plainview Railroad Company, a corporation of the State of Minnesota, party of the first part, and the Winona & St. Peter Railroad Company, a corporation of said State, party of the second part, witnesseth:

The said party of the first part, for and in consideration of the sum of two hundred and twenty-five thousand dollars ($225,000.00) to it paid by said party of the second part, the receipt of which is hereby acknowledged, and by virtue of the power and authority conferred upon the parties hereto by an act of the Legislature of the said State, entitled "An act to authorize the Winona & St. Peter

Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railroad Company," approved March 3d, 1881, and with the unanimous consent of the stockholders of both parties hereto, hath granted, bargained, sold, transferred, and conveyed, and by these presents doth grant, bargain, sell, transfer, and convey, to said party of the second part and to its successors forever all and singular the railroad of said party of the first part, beginning at a point within the corporate limits of the village of Plainview, in the county of Wabasha, in the State of Minnesota, to a junction with the railroad of the Winona & St. Peter Railroad Company in the county of Olmsted, in the State of Minnesota, a distance of about sixteen miles, more or less, with all and singular the franchises, including the franchises to be a corporation, and all rails, switches, turnouts, warehouses, station buildings, elevators, water tanks, turn-tables, side tracks, tools, ties, em-
102 bankments, superstructure, and all property of every kind and description, real, personal, or mixed, and all choses in action, moneys, debts, claims, or demands of every kind belonging to said party of the first part or in any manner appurtenant to the said railroad or any part thereof, hereby conveying all the effects and property of said party of the first part, wherever situated or being, so that said party of the second part may and shall own, possess, and enjoy the same to the same extent that the same were owned, possessed, and enjoyed by said party of the first part before the execution hereof.

To have and to hold the same and every part and parcel thereof to the said party of the second part and its successors forever.

In witness whereof the said party of the first part has caused these presents to be signed by its president, sealed with its corporate seal, and the same attested by its secretary the day and year first above written.

[Official Seal Plainview Railroad Company.]

PLAINVIEW RAILROAD CO.,
By ALBERT KEEP, *President.*

Attest: J. B. REDFIELD, *Secretary.*

Signed, sealed, and delivered in presence of—
WM. A. ALLEN.
M. M. KIRKMAN.

STATE OF MINNESOTA, } ss:
County of Winona, }

Be it remembered that on this 11th day of May, A. D. eighteen hundred and eighty-one, before me, the subscriber, a notary public in and for said Winona county, in the State of Minnesota, personally appeared Albert Keep, known to me to be the president of the Plainview Railroad Company, and Joseph B. Redfield, to me known to be the secretary of the said railroad company, who, as such president and secretary, executed the foregoing instrument, and they severally acknowledged to me that they executed the foregoing in-

strument as president and secretary of said railroad company and caused the corporate seal of the said company to be affixed
103 thereto, pursuant to authority given by the board of directors of said company, as the free act and deed of the said Plainview Railroad Company for the purpose therein specified.

Witness my hand and official seal the day and year aforesaid.

[Notarial Seal of Winona County, Minnesota.]

WM. A. ALLEN,
Notary Public, Winona County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Olmsted, }

I, H. R. Smith, register of deeds in and for the county of Olmsted, in the State of Minnesota, do hereby certify that I have compared the foregoing copy with the record of the original instrument as the same appears in my office, on page 403 of Book 53 of Deeds, and that the same is a true transcript of said record and of the whole thereof.

Witness my hand and official seal this 6th day of April, A. D. 1885.

H. R. SMITH,
Register of Deeds.

104 EXHIBIT "C."

District Court, Wabasha County, Third Judicial District.

THE TOWN OF ELGIN
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted as a matter of fact in each and both of the above-entitled actions as follows:

I.

That in the case of George W. Harrington against The Town of Plainview, T. G. Bolton, as chairman of the board of supervisors of the Town of Plainview, and others, referred to in the pleadings in the above-entitled action, a preliminary injunction was issued on the 11th day of November, A. D., 1878, commanding and enjoining the supervisors of the said town of Plainview to desist and refrain from issuing or delivering to the Plainview Railroad Company or to any one for it any bonds of the town of Plainview, &c.

That the action last above referred to was brought on for trial before the court, at chambers, at Winona, on the 27th day of January, 1879, and on the 6th day of February, 1870, the court made and filed his decision therein, in and by which he found and decided

that the plaintiff in said action was not entitled to the relief asked for, but that the defendants were entitled to judgment dismissing the action.

II.

That on the 8th day of February, 1879, an order was made on application of the plaintiff's attorney in said last-named action staying proceedings therein, a copy of which order is hereto annexed, marked "Exhibit A."

III.

105 That on February 26th, 1879, in the last above entitled action, an order was made granting a further stay of proceedings, a copy of which order is hereto annexed, marked "Exhibit B."

IV.

That on the 11th day of March, 1879, in the last above entitled action the court made an order denying a new trial therein, a copy of which is hereto attached, marked "Exhibit C."

V.

That on the 11th day of March, 1879, bond on appeal was given by the plaintiff in the last above entitled action, a copy of which is hereto annexed, marked "Exhibit D."

VI.

That on the 15th day of March, 1879, in said last above entitled action the court rendered judgment therein that the plaintiff's action be dismissed upon the merits and the preliminary injunction dissolved, a copy of which judgment is hereto attached, marked "Exhibit E."

VII.

That on the 12th day of March, 1879, the plaintiff's attorney in said last above entitled action gave notice of an appeal to the supreme court from the order of the district court above referred to denying a new trial in said action, a copy of which notice is hereto attached, marked "Exhibit F," and on the 12th day of September, 1879, the plaintiff's attorney in said last above entitled action gave notice of an appeal to the supreme court from the judgment aforesaid, a copy of which notice is hereto attached, marked "Exhibit G."

EXHIBIT "A."

(Title.)

"On application of the plaintiff herein it is hereby ordered that all proceedings herein upon or pursuant to the finding and decision of the court rendered herein be, and the same are hereby

106 stayed for the period of twenty days from this date, that plaintiff may prepare a case or bill of exceptions herein.

Dated February 8th, 1879.

WILLIAM MITCHELL,
Judge District Court."

EXHIBIT "B."

(Title.)

"It is hereby ordered that a further stay of proceedings herein on the part of the defendants for the further period of fifteen days after the expiration of the stay heretofore granted be, and the same is hereby, granted and ordered upon application of the plaintiff herein.

Dated February 26, 1879.

WM. MITCHELL,
District Judge."

EXHIBIT "C."

(Title.)

"This action having duly come before the court upon the application of said plaintiff, duly made, for an order granting a new trial herein on the 'ground that the decision of the court made herein is contrary to law,' and said application having been duly submitted by the parties, it is ordered that said application for a new trial herein be, and the same is hereby, denied.

Dated March 11th, 1879.

WM. MITCHELL,
District Judge."

EXHIBIT "D."

(Title.)

"Know all men by these presents that we, George W. Harrington, as principal, and D. R. French and R. Burchard, as sureties, are held and firmly bound unto each and all of the defendants above named in the sum of three hundred dollars, lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, or assigns; for the payment whereof, well and truly to be made, we, jointly and severally, bind ourselves, our
107 heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 11th day of March, A. D. 1879.

The condition of this obligation is such that whereas the said George W. Harrington, plaintiff, has appealed to the supreme court of the State of Minnesota from that certain order herein of said district court made and dated on this 11th day of March, 1879, refusing a new trial herein and from the whole of said order:

Now, therefore, if said G. W. Harrington, such appellant, shall and will well and truly pay all costs and charges which may be

awarded against him on such appeal, not exceeding the penalty of this bond, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals this 11th day of March, 1879.

GEO. W. HARRINGTON. [SEAL.]
D. R. FRENCH. [SEAL.]
R. BURCHARD. [SEAL.]

Signed, sealed, and delivered in presence of—
J. F. POPE.
R. C. WRIGHT."

(Justification of sureties.)

EXHIBIT "E."

(Title.)

"This action having been brought to trial by the court (a jury trial having been duly waived) and a decision thereon rendered for the defendants, it is now, on motion of Wilson & Gale and C. T. Benedict, the defendants' attorneys, ordered, adjudged, and decreed that the complaint and action be dismissed upon the merits, and that the preliminary injunction issued in action on the 11th day of November, A. D. 1878, be, and the same is hereby, dissolved, and that the defendants recover of the plaintiff four and seventy-five hundredths dollars, costs of this action.

March 15, 1879.

WM. MITCHELL,
District Judge."

[District Court Seal.]
CHAS. J. STAUFF, *Clerk.*

108 EXHIBIT "F."

(Title.)

"SIRS: Take notice that said plaintiff appeals to the supreme court of said State from that certain order of said district court herein made and dated on the 11th day of March, 1879, denying a new trial in said action and from the whole of said order.

Dated March 11th, 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

To Messrs. Wilson & Gale, attorneys for defendants, and to Chas. J. Stauff, clerk of said district court."

EXHIBIT "G."

(Title.)

"SIRS: You will please take notice that the plaintiff herein appeals to the supreme court of said State from that certain judgment of said district court rendered and entered herein on the 15th day of March, 1879, and from the whole thereof.

Dated this 12th day of September, A. D. 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

To Messrs. Wilson & Gale, attorneys for defendant.

Signed at Rochester, Minn., this — day of June, 1885, *to prove at the trial* said plaintiffs reserving the right to prove at the trial, if so ordered, the records of the district or supreme court in such actions.

KELLOGG & EATON AND
C. K. DAVIS,
Plaintiffs' Attorneys.
THOMAS WILSON,
Defendant's Attorney.

109 EXHIBIT "D."

STATE OF MINNESOTA, *County of Ramsey:*

District Court, Third Judicial District.

THE TOWN OF ELGIN
vs.
THE WINONA & ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW
vs.
THE WINONA & ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted as a matter of fact in both and each of the above-entitled actions as follows: That the judgments in the first two cases brought by Marshall & Ilsley against said towns, rendered in favor of said plaintiff by the United States circuit court, were removed by writ of error sued out by the defendants to the Supreme Court of the United States, and were by that Court dismissed before this action was brought, upon the ground that the amount in controversy upon the face of such records was less than five thousand ($5,000) dollars.

KELLOGG & EATON AND
C. K. DAVIS,
Attorneys for Plaintiff.
THOMAS WILSON,
Attorney for Defendants.

110 EXHIBIT "F."

(Title.)

Pursuant to an order of court duly made and entered in this cause on the 20th day of October, A. D. 1880. it is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Wabasha, be, and the same hereby is, in all things reversed and cause remanded for judgment pursuant to opinion; and it is further determined and adjudged that the appellant above named have and recover of said The Town of Plainview; T. G. Bolton, as chairman of the board of supervisors of the town of Plainview; C. E. Daniels and S. Struble, as supervisors of said town; A. B. W. Norton, as town clerk of said town, and The Plainview Railroad Company, respondents herein, the sum of one hundred and twenty-three dollars and seventy-five cents ($123.75), costs and disbursements in this cause in this court, and that said appellants have execution for the enforcement hereof.

By the court.

Attest:

[SEAL.] SAMUEL H. NICHOLS, *Clerk.*

Dated and signed this 16th day of November, 1880.

Statement for Judgment.

Cost allowed by statute	$25 00
Clerk's fees for making return	15 00
Printer's fees for printing paper book	35 00
" " " briefs	15 25
" " " brief in reply	24 00
Clerk's fees, supreme court	9 50
	$123 75

111 STATE OF MINNESOTA, *Supreme Court:*

I, Sam. H. Nichols, clerk of the supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the case herein entitled as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 29 day of January, A. D. 1881.

[Seal of the Supreme Court of Minnesota.]

SAM. H. NICHOLS.

Which said mandate was endorsed as follows: (Title of cause.) Transcript of judgment. Filed Feb. 10, 1881. Chas. J. Stauff, clerk.

112 EXHIBIT "T."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't,

and

THE TOWN OF PLAINVIEW, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.

C. T. BENEDICT, witness on behalf of the plaintiffs, having been first duly sworn, deposes and says:

By Mr. DAVIS:

Question. What is your full name?

A. Curtis T. Benedict.

Q. What is your occupation and place of residence?

A. My occupation is an attorney-at-law and my place of residence is 650 Astor street, Milwaukee, Wisconsin.

Q. Were you an attorney-at-law, resident in Rochester, Minnesota, in 1878, 1879, and 1880?

A. I was in 1878 and in 1879, until the last of March, 1880.

Q. Were you one of the attorneys for the defendants in the case of George W. Harrington against The Town of Plainview, T. G. Bolton, C. E. Daniels, S. Struble, A. B. W. Norton, and The Plainview Railroad Company, defendants, pending during those years or some of them in the district court of the State of Minnesota for the county of Wabasha?

A. I was the attorney or one of the attorneys for one or
113 more of the defendants. I was for the Plainview Railroad Company, but whether for the towns or not I am not sure now; I couldn't say without looking to the record.

Q. Who was the president of the Plainview Railroad Company in 1879 and 1880?

DEFENDANT'S COUNSEL: 1878, 1879, and 1880.

A. George W. Van Duzen was the president in 1878 and a part of 1879; whether later than that I don't know—don't remember.

Q. Down how far in 1879 do you remember that he was president?

A. My recollection is—and it is merely recollection—that he was president until the election of officers in June, 1879.

Q. Do you know whether anybody was ever elected to succeed him?

Objected to by defendant's counsel as not the best evidence.

A. I do not know, otherwise than I have been told by somebody, and by whom I am not sure, that there was a president elected to succeed him.

Q. During Mr. Van Duzen's presidency what were your relations to the Plainview Company?

A. I was in the employ of G. W. Van Duzen, of G. W. Van Duzen & Company, and among my duties were to look after the interests of such matters pertaining to the Plainview railroad as Mr. Van Duzen requested me to look after, and also to look after the interests of G. W. Van Duzen & Company and G. W. Van Duzen's private matters.

Q. Did you, in that capacity, act for the Plainview Railroad Company in regard to procuring the issuance and delivery of the bonds of the towns of Plainview and Elgin here in controversy?

DEFENDANT'S COUNSEL: One moment.

A. Acting for the Plainview Railroad Company, I did.

Q. What did you do?

A. Obtained the issuance of the bonds of the towns of Viola, Elgin, and Plainview.

Q. There was never any litigation in regard to the bonds of the town of Elgin, I believe, Mr. Benedict?

A. Not that I am aware of.

Q. Assuming that in the Harrington case, before referred to in your testimony, the action was adjudged dismissed upon the merits and the proper injunction issued therein on the 11th day of November, A. D. 1878, was dissolved by that judgment, which judgment was entered and filed on or about March 15th, 1879, what did you do immediately upon the entry of that judgment and the
114 dissolution of that injunction in regard to the bonds of the town of Plainview, and on what day did you do it?

Objected to as incompetent and immaterial.

A. Upon entry of the judgment dissolving that injunction and dismissing that action I obtained a certified copy of such judgment and went to the town of Plainview and asked the supervisors of that town to issue the bonds, which they did on the 18th and 19th of March, according to my best recollection, of 1879.

Q. Was this done before any notice was given to the plaintiffs' attorney of the dismissal of the suit and dissolution of the injunction?

DEFENDANT'S COUNSEL: What plaintiff's attorney? I object to that as incompetent and immaterial. I do not know that this witness knows anything about that; if he does, I have no objections to his answering.

A. I have no recollection on that subject at all.

Q. You were one of the defendant's attorneys. Have you any recollection of having given any such notice yourself before you took these steps?

A. I have no recollection of having given such notice.

Q. Now, Mr. Benedict, you got 50,000 dollars in bonds of the town of Plainview on the days you stated?

A. Yes, sir.

Q. Were they delivered in your hands personally?

A. They were.

Q. At Plainview?

A. At Plainview.

Q. Who filed that judgment for record in the clerk's office at Wabasha?

A. I am not positive about that. My impression is that I did.

Q. Did you not go from Rochester to Winona and draw up the judgment, have it signed by the judge, proceed from there to Wabasha, have it filed, and proceed from Wabasha to Plainview, — procure the bonds as you stated?

Objected to by defendant's counsel as incompetent, immaterial, and inadmissible under the pleadings.

A. I think not. My recollection is that the judge had himself filed his decision or sent it to the clerk of the court at Wabasha, and that I had received notice that such decision of the judge had been filed there, and that thereupon I went to Wabasha and had the proper judgment entered thereupon; that is my recollection.

Q. Now, after you got those bonds who did you deliver them to?

115 A. The bonds of the town of Plainview were, I think, sent to M. M. Kirkman, the treasurer of the Plainview Railroad Company, by express.

Q. By you?

A. By me in connection possibly with Mr. Van Duzen. Mr. Van Duzen and I were together—that is to say, I consulted him about my actions in those matters.

Q. Was Mr. Van Duzen at Plainview with you when you got these bonds?

A. I didn't send the bonds from Plainview. I took them to Rochester with me.

Q. Was Mr. Van Duzen with you at Plainview when you got these bonds?

A. No, sir; he was not.

Q. Did you get the Elgin bonds personally?

A. I did.

Q. Were they delivered to you?

A. They were.

Q. Fifty thousand dollars?

A. No, sir; forty thousand.

Q. When did you get them? When were they delivered to you?

A. The Elgin bonds were delivered to me on the 16th day of November, I think.

Q. What year?

A. 1878.

Q. What did you do with them when you got them?

Objected to as incompetent and immaterial.

A. I took them with me to Rochester, and Mr. Van Duzen and myself went to Chicago with them, and there delivered them to Mr. M. M. Kirkman, the treasurer of the Plainview Railroad Company, in the presence of Mr. Keep and Mr. Redfield.

Q. About when did you make that delivery—immediately after you got them?

A. Yes. Those bonds were delivered (referring to memorandum) on the 20th day of November, 1878.

Mr. DAVIS: It is conceded that the 50,000 and 40,000 bonds here in question are the only bonds ever issued by these towns.

Judge WILSON: Well, it is conceded that they are the only bonds issued by these towns which at all enter into this controversy.

Mr. DAVIS: Well, that will be sufficient.

Cross-examination by Judge WILSON:

Question. Mr. Benedict, do you recollect a meeting which was had at the city of Rochester in May, 1878, at which were present Albert Keep, president of the Chicago & Northwestern Railroad
116 Company; Marvin Hughitt, its general manager; Redfield, its auditor; George W. Van Duzen, yourself, and myself?

A. I do.

Q. Do you or do you not remember whether or not at that meeting a certain memorandum in writing was made and entered into between the Northwestern Railway Company and George W. Van Duzen touching the Plainview railroad and touching the bonds to be issued to the Plainview Railroad Company by the towns of Elgin and Plainview?

Plaintiffs' counsel objects to question as immaterial and irrelevant.

A. I remember an agreement. I remember that there was an agreement entered into between George W. Van Duzen and other parties with reference to the Plainview Railroad Company. My recollection was that it was entered into with individuals—with men who were possibly stockholders or perhaps officers of the Northwestern Railroad Company—but I have this morning seen a paper which induces me to believe that the agreement was with Mr. Van Duzen and the Northwestern Railroad Company rather than with men, as my recollection was.

Q. Well, as a matter of fact, was there any but one such agreement?

A. There was not, to my knowledge.

Q. Were or were not the transaction and steps which had previously been taken with reference to securing the bonds of the towns of Elgin and Plainview by Mr. Van Duzen discussed at that meeting and in the presence of those parties?

Plaintiffs' counsel objects as incompetent and immaterial.

A. Yes, sir; they were.

Q. Fully or not?

Same objection.

A. Very fully, I think.

Q. Was it or was it not there stated that the bonds of those towns were applied for and were to be issued on petitions signed by the tax-payers?

Plaintiffs' counsel objects as incompetent, immaterial, and irrelevant.

A. I do not know that it was stated in those terms, but my recollection is that there were copies—certified copies—of the petitions and of information, affidavits, and possibly certificates that had been obtained, showing the details of the method adopted for procuring the bonds.

Q. And those certified copies did show the fact that the bonds were applied for and the steps taken to obtain them was on petition signed by the tax-payers?

117 Plaintiffs' counsel objects to question and answer as not the best evidence, immaterial, and irrelevant.

A. Yes, sir; those certified copies did show that.

Q. Either in words there spoken or in documents there presented, was that fact made perfectly clear—the manner on which those bonds were applied for and were to be issued?

Same objection as last before.

A. I think it was fully shown by the documents there presented and examined by all the parties. I think it was fully shown.

Q. You have stated that at a prior and subsequent to this last-mentioned date, namely, May, 1878, you were in the employ of G. W. Van Duzen & Company and of Geo. W. Van Duzen, and as a part of your duties you did attend to some of these matters touching the Plainview railroad, have you not?

A. My employment and the arrangement with me was made with Mr. G. W. Van Duzen, and I was to do such work as he set me at, and my business included attending to his own private matters, the matters of the firm of G. W. Van Duzen & Company, and the matters of the Plainview railroad. As to who paid me my salary, whether the firm or the railroad, or as to whether it was out of his private pocket, I don't know.

Q. But whatever Mr. Van Duzen instructed you to do you did?

A. I did; yes, sir.

Q. And in the matters pertaining to this Plainview railroad, as in other matters, you were subject to his instruction and direction and did as he directed you?

A. Yes, sir; it was understood at the time of this transfer in May that I was to be retained in the employ of Mr. Van Duzen for the purpose of perfecting the title to the right of way of the Plainview Railroad Company, and for the purpose of doing whatever was necessary for obtaining the bonds of those towns.

Q. Was it not, Mr. Benedict, spoken that you should be—that Mr. Van Duzen should retain you to do certain things touching the right of way and do certain other matters that it was agreed between him and the Northwestern Company he should do?

A. That was the agreement—that he was to retain me to perform those things which he was to do—under his arrangement with the Northwestern Company, I believe.

Q. He agreed with the Northwestern Company to do certain things, and he agreed to retain you to assist in doing some of those things?

A. Yes, sir.

118 Q. Now, in the obtaining of the bonds of the towns of Elgin and Plainview, did you or did you not in what you did in that respect do as you were directed by Mr. Van Duzen or Mr. Redfield or Mr. Keep or all of them?

Plaintiffs' counsel objects as immaterial, incompetent, and irrelevant.

A. Well, the directions were to obtain the bonds as soon as the railroad was complete to those towns and the railroad was entitled to them, and the blank bonds were sent to me by Mr. Redfield for my opinion as to whether they were proper in form, and I made some suggestions in reply to him, and the bonds were changed in form and prepared for the special towns—prepared specially for the three towns—and then the bonds were sent to me from Mr. Redfield, with the understanding that the bonds were to be obtained at once, as soon as the railroad company was entitled to them. What those instructions were in detail I cannot at this moment recall. Mr. Van Duzen also, advising with me, said that the bonds——

Mr. DAVIS: Judge Wilson, have you any objection to his stating what railroad he means?

Judge WILSON: Not at all.

WITNESS: I refer to the Plainview Railroad Company.

Q. You were going on to state that Mr. Van Duzen also did something.

WITNESS: Mr. Van Duzen also directed me to get the bonds of the towns of Viola, Elgin, and Plainview as soon as possible after the company had performed their contract on their part and were entitled to them.

Q. You say, too, you had corresponded with Mr. Radfield about this?

A. Yes, sir.

Q. Who is this Mr. Redfield? Is he not the auditor or secretary, or both, of the Chicago & Northwestern Railway Company, having his office in Chicago?

Plaintiffs' counsel objects as incompetent, immaterial, not warranted by the pleadings, and irrelevant.

A. I believe he is such officer, and he was at that time the secretary of the Plainview Railroad Company. As such I corresponded with him.

Q. Counsel for the plaintiffs in these suits have asked you whether you were or were not one of the attorneys in the case of Harrington

against The Town of Plainview and others. You stated you were. Please state who were the attorneys in that suit.

A. The firm of Wilson & Gale, I think, were the attorneys for the defendants also in that suit.

Q. With you?

A. With me; yes.

119 Q. Who was the attorney for the plaintiff?

A. Robert Taylor was. Whether he had a partner with him at that time I should have to refer to the papers to see. I think he had a partner at that time with him also. Taylor & Sperry were the attorneys for the plaintiff.

Q. Was Taylor the man who attended to the suit for the plaintiff in every respect, so far as you know?

A. Yes, sir; he was.

Q. Did you ever know Sperry to take any part in that suit whatever in any way?

A. I don't recollect that I did. I think not.

Q. Did Mr. Taylor live at that time in the city of Winona?

A. I think he did.

Q. Did Wilson & Gale live in Winona?

A. They did; yes, sir.

Q. Did Judge Mitchel live in Winona?

A. He did; yes, sir.

Q. Did or did not Wilson & Gale take the principal part in taking the steps in that suit on the part of the defendants?

A. I think they did.

Q. Have you any reason to believe that Mr. Taylor had not actual notice of every step taken in this case touching the dissolution of this injunction and the subsequent steps?

A. I have no knowledge on that matter whatever. My recollection is that the notices in the case were usually served between Mr. Taylor and the firm of Wilson & Gale, being both of them in Winona, and that so far as I was concerned, being at Rochester, fifty miles away, that most of my notices came subsequently by mail or were either by mail from Mr. Taylor or by mail from Wilson & Gale.

Q. Was not Mr. Kirkman, of whom you have spoken, at that time and long prior thereto the treasurer of the Chicago & Northwestern Railway Company—the local treasurer?

A. Well, I think he was at that time; think he had been for some time before, but for just how long I don't know.

Q. Was or was not a reference to the law under which these bonds were issued and to the section of the law which provided for an issuance on a petition of the tax-payers incorporated in and made a part of those bonds, so that the fact might be notice to everybody taking them of the steps taken prior to and as a condition to their issue?

Objected to as incompetent.

120 A. A reference to the law was incorporated in the bonds, but whether or not the particular section or sections under which

they were issued were put in the bonds by number or by date of the passage of the law I cannot at this time tell without reference to the bonds themselves.

Q. According to your best recollection was not a reference made to the fact that these bonds were issued on petition of the tax-payers?

Same objection as last before.

A. Yes, sir; I am quite sure that such a statement as that was contained in the bonds.

Q. Do you know whether that was not done with the view to give notice to persons purchasing the bonds of the law under which they were issued?

Same objection as last before.

A. Yes, sir; I know that that was the fact, because I had it incorporated; because the Plainview bonds that were sent to me first were after the form that I think had been used for the issuance of bonds to the Rochester & Northern railway, in which the bonds had been obtained by a vote of the people, and it was so stated on the face of the bonds, and I called Mr. Redfield's attention to the fact that that would not meet the requirements in this instance, and that it should be stated on the face of the bonds that those bonds were obtained by petition therefor and not by a vote of the people, and that was incorporated in the bond, that they were obtained by petition of the tax-payers.

Q. When those bonds were issued you believed, and as far as you know everybody else connected with obtaining the issue of those bonds believed, that they were legally issued and that the railroad companies had a legal right to them. Is this not so?

Objected to as immaterial.

A. Yes, sir; I certainly thought so, and I thought that the law had been complied with in every particular.

Q. So far as you know, didn't everybody else having any connection with them so believe?

Objected to as immaterial.

Q. I mean those—say Mr. Van Duzen, or Keep, or Hughitt, or Mr. Redfield, or Kirkman.

Same objection.

A. They certainly did, so far as any expression I ever heard any of them make. Certainly every care on my part was taken to make the bonds as legal and strong as possible. That was my business, what I tried to do.

Q. Do you or do you not know whether Thomas Wilson, an attorney-at-law, of Winona, Minnesota (myself), was employed by the Chicago & Northwestern Railroad Company to examine the
121 steps taken preliminary to the issuance of these bonds, and

whether he was not present at that meeting in Rochester in May, 1878, to which you have referred?

Objected to as immaterial.

Q. And whether he did not, at that meeting, advise Mr. Keep, Mr. Hughitt, and Mr. Redfield that, in his opinion, those steps had been legally taken, and that those bonds, if issued thereunder after the construction of the road would be valid?

Objected to as immaterial.

A. I know that Judge Thomas Wilson was at Rochester at that meeting, and know that he did examine the papers and the proceedings that had been had with reference to the organization of the Plainview Railroad Company and with reference to the proceedings for the obtaining of the bonds in question, and I well remember that he did advise Mr. Keep, upon the special questioning and request of Mr. Keep, that, in his opinion, the proceedings had been regular, and that the bonds, if obtained upon those proceedings, would be legal and valid, and that he did not in any way see that any of the proceedings were irregular or imperfect. As to whose employ he was in at that time I do not know, further than I understood he was acting for the parties who were then negotiating with Mr. Van Duzen.

Q. Didn't he give this opinion in answer to the request of Mr. Keep for his opinion on that subject—was it not?

Objected to as immaterial.

A. It was.

Testimony read.

Q. You have heard your testimony read over, Mr. Benedict. Is there any explanation which you wish to make or any addition which you wish to make to any answer?

A. It now occurs to me that the decision of Judge Mitchell in the suit of Harrington was made and filed some time in February, I think, of 1879, and that thereupon the plaintiff made a motion for a new trial, which motion was heard by Judge Mitchell, and the new trial was by him refused; that thereupon, on or about the 11th of March, 1879, the plaintiff appealed to the supreme court of the State from the decision of Judge Mitchell from the order denying a new trial, and that no bonds were given to stay proceedings or to continue the injunction during the appeal, and that thereupon the judgment of dismissal of the action was entered, and the bonds of the town of Plainview were thereafter obtained. That is my recollection of the transaction without having had an opportunity to examine the record.

122 Redirect examination:

By Mr. DAVIS: Mr. Benedict, after you sent the Elgin bonds to Mr. Kirkman did you receive from him any receipt for those bonds?

A. The Elgin bonds were not sent to Mr. Kirkman. They were

delivered to him personally, in Chicago; but on the delivery of those bonds to him personally he gave me a receipt at that time.

(Paper shown witness, marked Exhibit A.)

Q. Is that the receipt which Mr. Kirkham executed to you?
A. It is.

PLAINTIFFS' COUNSEL: I offer it in evidence.
DEFENDANT'S COUNSEL: I object to this as incompetent.

(The witness, desiring to retain the original, it is consented, subject to the above objection, that the following copy of the said document may take the place of the said original.)

DEFENDANT'S COUNSEL: I have no objection to that.

Contents of document as follows:

"Received, Chicago, November 20th, 1878, by hands of C. T. Benedict, eighty bonds of five hundred dollars each (that is, forty thousand par value), executed by the town of Elgin, Wabasha county, Minnesota, bearing date January 1st, 1879, maturing twenty years from their date, and bearing interest at the rate of seven per cent., payable annually, January 1st each year, and represented by twenty coupons attached thereto."

(Signed) M. M. KIRKMAN,
Treasurer Plainview Railroad Company.

Mr. KELLOGG:

Question. The Plainview bonds were sent by express?
WITNESS: That is my recollection, that they were sent by express from Rochester to Mr. Kirkman, at Chicago.
Mr. DAVIS: Have you any receipt for them?
A. I don't think I have. I looked this morning to see if I had and did not find it among my papers; don't think I have any receipt. It is barely possible that I may have received some letter of acknowledgment for them, but if I did I think probably it was left at Mr. Van Duzen's office, in Rochester, Minnesota, and, in fact, the bonds may have been sent down in Mr. Van Duzen's name, and the communication may have been directed to him, if there
123 was a communication or acknowledgment of the receipt of the Plainview bonds.

(Signed) C. T. BENEDICT.

Subscribed and sworn to before me April 13th, 1885.
[NOTARIAL SEAL.] W. E. STORY,
Notary Public, Milwaukee County, Wisconsin.

All irregularities in the mode of certifying or returning these depositions are waived by the parties.

124 EXHIBIT "U."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't,
and
THE TOWN OF PLAINVIEW, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.

Depositions taken, pursuant to annexed notices, on behalf of the plaintiffs in the two above-entitled actions by W. E. Story, a notary public, at his office, room 34, 395 East Water street, in the city of Milwaukee, Milwaukee county, Wisconsin, on the second day of April, 1885.

Present: On behalf of the plaintiffs, C. K. Davis and Frank B. Kellogg, and on behalf of the defendants, Thomas Wilson.

CHAS. F. ILSLEY, being first duly sworn, testified as follows:

(By agreement of the parties this testimony is to be taken by a stenographer and transcribed by him, and thereafter to be subscribed by the witnesses and certified by Mr. Story.)

Examination of CHAS. F. ILSLEY by Mr. KELLOGG:

Question. Mr. Ilsley, you may state your name, place of residence, and your business.

A. Charles F. Ilsley; Milwaukee, Wisconsin; banker.

125 By Mr. DAVIS: What firm?

A. The firm of Marshall & Ilsley.

Q. Give the full name of the members; yourself and——

A. Well, it is composed of five members now. It has changed the last year or two. Samuel Marshall and——

Q. Is Samuel Marshall a member of that firm?

A. Yes, sir.

By Mr. KELLOGG:

Q. This is the Samuel Marshall and Charles F. Isley that were plaintiffs in the action between Samuel Marshall and Chas. F. Ilsley and The Town of Elgin?

A. Yes, sir.

Q. In the circuit court of the United States, district of Minnesota?

A. Yes, sir.

Q. Mr. Ilsley, you may state if you ever owned—if Marshall & Ilsley ever owned—any of the bonds purported to be issued by the towns of Plainview and Elgin to the Plainview Railroad Company.

A. (Referring to memorandum.) Yes; we have bought some of those bonds, in 1879.

Q. What date?

A. July 8th, 1879.

Q. Now, you may state what bonds you purchased that were issued by the town officers of the town of Plainview, giving the numbers of the bonds and when you purchased them.

A. I don't think I have the numbers here. We bought $35,000 of Plainview at that time.

Q. $35,000?

A. $35,000; yes.

Q. You may state what bonds purporting to be issued by the town officers of the town of Elgin you purchased, giving the date.

Mr. DAVIS: I should change that to what Elgin bonds. Put it right square. What bonds of the town of Elgin?

Mr. KELLOGG: What bonds of the town of Elgin?

A. We bought $35,000 of the same amount; same date—July 8th, 1879.

Q. Are they the same bonds, both of the town of Plainview and Elgin, that suits were brought by you to recover the coupons of in the circuit court of the United States?

A. Yes, sir; these bonds and others.

Mr. DAVIS:

Q. By you you meant Marshall & Ilsley as plaintiffs in that court against these towns?

A. Certainly; yes.

Q. Of both these towns you bought 70,000 in issue?

126 A. At that time; yes. I find from these books that we bought others subsequently, and it seems to me that we traded, bought, and sold.

Q. I wish to ask you, Mr. Ilsley, whether, since you bought that 70,000, you have bought other bonds of either of these towns?

A. Yes, sir.

Q. How many of Plainview, and when?

A. Well, I can't tell you about that.

Q. As near as you can state.

A. Oh, I should think we bought some eight or ten thousand of Plainview after that. Some, I should think, 2 or 3 thousand of Elgin.

Judge WILSON: How much of Elgin?

A. Two or three thousand.

By Mr. DAVIS: Can you state when those purchases were made?

A. Well, some time in the same year, I think, 1879, we bought some bonds; I think that is the time.

Q. How many during that year should you state?

A. Well, that I can't say, but my recollection is somewheres from five to ten thousand of Plainview and somewheres between two and three of Elgin.

Q. As to the balance, within what time did you buy them? Do you think they were all bought within the same year?

A. I think so; and traded.

Q. Mr. Illsley, from whom did Marshall & Ilsley purchase the $70,000 in bonds first referred to by you in your answers?

Defendants' counsel objects to this question and to the answer thereto as incompetent and irrelevant.

A. We bought them of Mr. Thomas.

Q. Of what place?

A. Here in Milwaukee.

Q. What was his business?

To the last question defendants' counsel objects as incompetent and irrelevant and to the answer thereto.

A. We supposed at the time he was agent of the Chicago & Northwestern railway.

Q. Of whom did you buy the other bonds not included in your answers just given?

A. We bought some of those of Mr. Thomas, I notice on the record, later in the season.

Q. Do you remember who you bought the others of?

A. I don't know who we bought the others of.

Q. Did you buy most of them of Mr. Thomas?

A. I think so; yes.

Q. Now, Mr. Ilsley, I will ask you what knowledge or notice
127 or I am compelled to ask you what you paid for these bonds—the 70,000 that you purchased—what are the whole lot? What did you pay for the bonds that you thus bought?

To the last question and to the answer thereto the defendants' counsel objects as incompetent and irrelevant.

A. We paid 87 cents on the par value.

Q. Had you or Mr. Marshall had before or at the time you bought and paid for those bonds any knowledge or notice of any fact affecting the validity of those bonds?

Objected to by defendants' counsel and to the answer thereto as incompetent and irrelevant.

A. We had not.

Q. By whom were the negotiations which resulted in the purchase of those bonds by you and Mr. Marshall conducted?

A. On our part?

Q. Yes.

A. By myself.

Q. Exclusively?

A. I think so; yes.

Q. Now, Mr. Ilsley, since you acquired these bonds——

WITNESS: Well, of course, I conferred with Mr. Marshall; the negotiations with Mr. Thomas were made by me. I conferred with Mr. Marshall at the time.

Q. The question resolves itself into this: Whether Mr. Marshall knew anything about the history of these bonds which you yourself didn't communicate to him.

A. No; no.

Q. Now, Mr. Ilsley, have Marshall & Ilsley disposed of these bonds or any of them?

To this question and to the answer thereto the defendants' counsel objects as incompetent and immaterial.

A. Yes; we have disposed of all of them, except 3,000 Elgin bonds, which we are the owners of now.

Q. When did you thus dispose of those bonds?

A. Well, we disposed of them in 1879.

Q. To actual purchasers for cash?

A. Yes; hold on, in 1879 and 1880 we sold them. We sold 31,000 of Elgin prior, or 29,000 prior to November 21st, 1880; July 19th, up to July 19th, 1880, we sold 29,000, and up to September 1st of the Plainview—that is the following year——

DEFENDANTS' COUNSEL: September, 1880?

A. Yes, sir; 27,500 of the Plainview; yes.

Q. Now, if you will, go on and state the history of the subsequent sales that you had, if convenient there, and the dates.

DEFENDANTS' COUNSEL: To all this defendants' counsel objects as incompetent and immaterial.

128 A. I think it was in October or November of that year that we first learned of the decision or that there was a suit pending in the supreme court of the State of Minnesota; yes.

Q. That is, October or November of the year 1880?

A. That is, the decision was made, I think, in the——

Q. Harrington case?

A. Yes; latter part of October or early in November, 1880, I think it was.

Q. Now I will ask you when you first heard of the decision of the supreme court in the case of Harrington against The Town of Plainview?

Defendants' counsel objects to this and to the answer thereto.

PLAINTIFFS' COUNSEL: Well, I will modify that question a little: When did you first hear of the existence of the suit of Harrington against The Town of Plainview and The Plainview Railroad Company in the courts of Minnesota?

To this question and to the answer thereto defendants' counsel objects as incompetent and immaterial.

A. The first we knew of it we heard of the decision.

Q. Of the supreme court?

A. Yes; the first we knew of the existence of any such suit.

Q. When was that?

A. My impression is it was in either the latter part of October or early in November, 1880.

Q. That was after you had bought all these bonds?
A. Oh, yes.
Q. And paid for them?
A. A year and several months after; we bought them in July the previous year.
Q. And paid for them?
A. And paid for them; yes.
Q. And negotiated how many of them?
A. Well, we negotiated the great bulk of them at that time.
Q. Negotiated the great bulk?
A. Yes; I was going to say after that decision we didn't sell a bond at all. We didn't sell any more bonds until we obtained the decision in our suit in the United States court and the Supreme Court at Washington. I think it was in 1883 before we sold another bond.
Q. How many should you think you had on hand at the time the decision of the supreme court of Minnesota in the Harrington case was announced?
A. Well, I should say from fifteen to twenty thousand of both towns.
129 Q. Do you know, Mr. Ilsley, what became of the bonds of either of these towns which Marshall & Ilsley did not acquire?

DEFENDANTS' COUNSEL: One moment; we object to that as incompetent and immaterial.

A. There were ten thousand Plainview sold to a gentleman in—I think it was Rhode Island; Newport, Rhode Island. I think Mr. Thomas sold them to him. The only way that I know anything about it we have purchased the coupons since of those bonds sent to us.
Q. And as to the town of Elgin?
A. Some, I think, Mr. Thomas sold in Cincinnati; I don't know to whom.
Q. Have you had the coupons since?
A. Yes; we bought most of these coupons since.
Q. Do you know when these sales were made to the Rhode Island and Ohio men?
A. I think that was in 1879; I think that was shortly after the issue.
Q. Did these parties to whom Marshall & Ilsley sold the bonds of these towns and they had thus acquired pay Marshall & Ilsley full value for them?
A. Full value?

DEFENDANTS' COUNSEL: He stated how many cents on the dollar.

Mr. DAVIS: He did not state how many they paid him.
DEFENDANTS' COUNSEL: We object to that as incompetent and immaterial.

A. We sold them at various prices. What do you call a full value—par value?

Mr. DAVIS: No; I wanted to have you put a construction on that.

A. At a profit. We didn't sell any at a loss; we sold them at a profit.

Q. You sold all that you acquired to various parties at a profit?

A. Certainly; yes.

Q. For cash?

A. For cash; yes.

Cross-examination:

Q. Before you bought any of these bonds you yourself went into Minnesota to look up the matter?

A. Yes. Well, I will just explain by saying that at that time there was several other towns that issued bonds—the town of Chatfield and the town of Pine Island, and the town of Zumbrota and the town of Minneola, the village of Pine Island; and we had some negotiations with Mr. Thomas about these bonds of these other towns, so I went up to Minnesota and visited Chatfield and
130 Pine Island. I think at that time we hadn't any idea of buying these Elgin and Plainview bonds—to investigate about these bonds; and at the same time, incidentally, we learned about these Elgin and Plainview bonds—learned from Mr. Jones, attorney at Rochester.

Q. This was R. A. Jones, an attorney at Rochester?

A. Dick Jones, they generally call him.

Q. He stated to you that he had looked to the issuance of these bonds and to the taking of steps that were taken preparatory to their issue, did he not?

A. Yes, sir.

Q. And he told you what steps had been taken, and so forth?

A. Yes. It was simply an evening call. We were at Rochester and we went up to see Jones. I don't know—it wasn't about these bonds particularly.

Q. Who do you mean went to see him?

A. Thomas was with me.

Q. Thomas, who was selling these bonds, and yourself, who was purchasing them?

A. And Mr. Hanks, of Madison.

Q. Mr. Hanks was talking about buying some of them, too?

A. Yes.

Q. And you two persons who were talking about buying these bonds and the man who was selling them went to see the attorney who had taken the steps preparatory to their issue?

A. Yes.

Q. And on inquiry he told you what had been done?

A. Yes.

Q. And after that you made the purchase?

A. After that I made the purchase; yes.

Q. And still later than that you obtained a copy of the laws and of all the proceedings taken in the issue of these bonds and sub-

mitted those matters to Ex-Chief Justice Dixon, of the State of Wisconsin and of the city of Milwaukee?

A. Yes, sir.

Q. And got his opinion on it?

A. Yes.

Q. And he gave you his written opinion that the bonds were legally issued and valid?

A. In his opinion, yes.

Q. And you believed it and hadn't the least doubt about it?

A. Not the slightest; no.

PLAINTIFFS' COUNSEL: All that testimony from his visit
131 to Minnesota down to his last answer taken subject to objection as immaterial, irrelevant, incompetent, etc.

Q. Of these opinions which you had obtained as to the legality of the issue of these bonds you informed those who purchased of you or else sent them copies of the opinion?

A. Oh, yes; we showed them the opinion—those we sold bonds to here. I don't mean to say that we did in every case to those who purchased the bonds. We did in some instances, but in some instances the parties who bought the bonds believed what we told them.

Q. But some you showed this opinion?

A. I think so; yes.

Q. Subsequently you brought a suit in the circuit court of the United States for the district of Minnesota, in which Marshall & Ilsley were plaintiffs and these towns, respectively, were defendants, to collect the interest coupons of these very bonds, did you not?

A. Yes, sir.

Q. And in those suits, by the judgment of that court, you were held to be entitled to recover?

A. Yes; and have recovered.

Q. And have recovered?

A. Got one judgment paid yesterday against Plainview.

Q. You of course examined the bonds themselves before you purchased them?

A. Certainly; yes.

Q. And knew all about their contents?

A. Oh, yes.

Q. I want to ask a question further. Had you or Hanks or Thomas any acquaintance with Jones before this time which you called upon him?

A. I don't know anything about the other gentlemen. I never saw him before.

Q. So far as you know, each and every one of you went and called on him at that time as the attorney who had charge of the issuance of these bonds and of the taking of the step preparatory to their issue and to ascertain from him what those steps were and what had been done preparatory to the issue of these bonds?

A. No. As I said before, at that time we hadn't any idea of buy-

ing these Elgin and Plainview bonds at all. It was incidental that this conversation came in about these bonds.

Q. If you didn't go to see Mr. Jones about the question of these bonds what did you go to see him for?

132 A. Well, we went to talk to him about these other bonds that we were talking of buying at that time, you know. We hadn't bought any bonds at that time at all. We were talking about buying Chatfield and Pine Island, Zumbrota, Minneola, &c.

Q. And so forth?

A. Yes, sir.

Q. And then you found out about these and asked him about these?

A. Yes; incidentally he spoke about these other bonds.

Q. About these Elgin and Plainview bonds?

A. Yes.

Q. And the conversation turned on those?

A. Turned on those; yes.

Q. And then the thought occurred to you that you would purchase these?

A. No; I guess I didn't think anything about it at that time: of course, we were interested in hearing what he had to say about it.

Q. Well, you were making this inquiry not as a matter of recreation but as a matter of business, were you not? You had nothing that called you to see Mr. Jones, except business, had you?

A. We knew that he was the attorney of the railroad at that time, at least had been taking steps in the issuance of these bonds of the various towns, and, of course, we sought him for the purpose of getting information—no doubt of it.

Redirect examination:

Q. While you were on that visit to Minnesota in which you saw Mr. Jones did you make any investigation as to the Elgin or Plainview bonds?

A. We didn't, except this conversation with Mr. Jones; that is all. If we had had any idea of buying these bonds we should have gone to those towns, but not having any idea of buying the bonds, we didn't go.

Q. Was this a casual conversation with Mr. Jones or was it a conversation that was sought by you? Who introduced the subject?

A. We went to see him, learning that he was the attorney of the Northwestern road, in regard to the issue of these bonds—that is, that he had been employed by them to see that the proper steps had been taken; of course, we went to see him to ask him about them; ask about the other ones, about these bonds issued by the other towns.

Q. In the course of the conversation who brought up the subject of the other towns?

A. That I don't remember now.

Q. Did Mr. Jones go in that conversation into details as — the stat-

utory steps which had been taken in regard to the issue of the Elgin and Plainview bonds?

A. I don't think he did; I don't recollect now.

133 Cross-examination:

Q. Now, Mr. Ilsley, don't you think that Mr. Jones told you about the steps which had been taken preparatory to the issue of these bonds at that time?

A. I don't recollect that he did so. I know he had no particular interest, no identical interest, in those bonds; he only told us in a general way that he had attended to the issue—that is, on the part of the railway company—by having these bonds issued, and that all steps taken were regular and legal, and that the bonds were valid. I recollect he came down on my shoulder, and says he, "They are just as good as the bonds of the United States."

Q. The Plainview and Elgin?

A. Plainview and Elgin.

Q. Well, how did he come to make that statement to you about the bonds of Plainview and Elgin being at that time just as good as the bonds of the United States if you were not enquiring about and discussing them?

A. Well, I don't know. I suppose——

Q. You don't know?

A. He wanted to facilitate the sale or something of that kind.

Q. One moment. Have you the least reason in the world for stating, Mr. Ilsley, and, if so, state what reason you have, that Mr. Jones had any interest in or desire to assist the railroad company or anybody to sell those bonds?

A. No.

Q. You say no?

A. No; I have not.

Q. Have you any reason in the world to suppose that he had any interest in or desire to do anything but answer your inquiries and give you the information sought?

A. No.

Q. So far as you now can recollect, all he did was to answer your queries and the queries of Hanks and the queries of Thomas on that occasion, and to give you such information as you asked of him about these bonds of Plainview and Elgin?

A. That was all; that was the general conversation. I have forgotten now about it.

Q. You have forgotten now about the conversation?

A. Yes.

Q. But you do remember that there was at that time and place a conversation about the issue of these bonds and the validity of the steps taken preparatory to their issue?

A. Yes.

134 Q. And may it not be that he then went on and told just what steps had been taken?

A. Possibly; but I don't remember. I think if he had I should have recollected it.

Q. Do you remember the steps which he stated had been taken?

A. I don't think he could for this reason——

Q. Wait a moment; if you will just wait till I ask the question and then answer we will get along better. Do you remember the steps which he had been taking concerning the issue of the other bonds that you went there to inquire about?

A. Nothing except in a general way.

Q. Well, what did he say, then, had been done preparatory to the issue of the bonds of the town of Chatfield which you say you went there to purchase?

Objected to as immaterial and not cross-examination.

A. Well, we didn't go there on purpose; as I say, it was simply a visit; it was in a general way that the steps had been taken—that he knew what steps had been taken, and everything had been done in a valid way. I don't know as I asked him what steps had been taken, only in a general way.

Q. So far as you can remember, didn't he state to you just as much of the steps which had been taken as to the towns of Plainview and Elgin as he did as to the other towns?

A. In a general way, yes.

Q. If he didn't state to you in a particular way just as much of the steps which had been taken as to the towns of Plainview and Elgin as he did as to the other towns, state to us wherein he stated any more particulars as to the steps as to one town than the other.

A. I don't remember that he stated as to any of the towns in any particular way; don't know anything of the kind at all.

Q. You went up there with a view to make inquiries as — the bonds of certain of these towns which you wished to purchase?

A. Yes, sir.

Q. You made those inquiries and he answered all questions he was asked?

A. We didn't go to see Jones about it at all. We simply got back to Rochester and had to be there over night. We didn't go to Minnesota to see Jones at all. We were in Rochester, and when we were in Rochester we heard of Jones being there, and only went up to make him a call—that is all—and this conversation took place.

135 Q. Do you mean to say that you made him a call for any other purpose than to enquire about these bonds?

A. We had been to Chatfield, Pine Island, and Zumbrota, and were on our way home.

Q. Did you go to see him for any purpose only to inquire about these bonds and the steps taken preparatory to their issue?

A. We went to call upon Jones, and we got into the conversation about these bonds.

Q. Will you state that you went to call on Mr. Jones for any reason in the world except to inquire about these bonds?

A. I don't know; I can't tell about that.

Q. Will you state that any one of those gentleman there had any acquaintance with Jones, with Jones' relatives, or had any reason in the world to see him except to inquire about these bonds?

A. When we were in Chatfield we saw Jones' brother, I think, and he told us that his brother at Rochester had been employed on the part of the railway company to take the necessary steps to have the towns issue these bonds. We learned it from him, I guess, in the first start, and so it occurred to us we would go and see Jones that evening.

Q. That is the reason you went from Chatfield to Rochester, to see Jones?

A. No, not purposely.

Q. If there is any other reason——

A. I tell you I didn't go for that purpose; it was merely a general conversation.

Q. One moment. I wish to ask you a question and simply wish you to answer it. Did you go to see Mr. Jones for any purpose in the world except to inquire about the steps taken preparatory to the issue of these bonds? If so, state for what other purpose you or any of you went.

A. That was in 1879. I can't tell so far back; it might have been in a social way, and perhaps it was to enter into conversation about these bonds.

Q. Have you any reason to believe that you had any reason or desire to call on Mr. Jones in a social way?

A. We might have had; yes.

Q. Do you say you had?

A. I don't say, because I don't recollect.

Q. Have you any reason to believe that you had either any right or desire to call on Jones in a social way, or in any other way than to get from him the facts as to the proper steps taken with reference to the issue of these bonds?

A. Why, yes.

Q. State what reason you have to believe so.

136 A. Why, in a social way; we were there in the evening, with nothing to do. I don't know who proposed to call on Jones—perhaps Mr. Hanks or Mr. Thomas—and so we went up and called upon him.

Q. In a social way?

A. Yes.

Q. You swear to that?

—. No, I don't swear to it, because I don't recollect about it.

Q. That is all I will ask you.

WITNESS: I say that the conversation with Jones had nothing to do with the purchase of these bonds. We would have purchased these other bonds whether we had ever seen Jones or not.

Q. It had a great deal to do, hadn't it, with the inquiry with reference to the steps that had been taken with reference to their issue?

A. Incidentally; we had made up our minds about these bonds before we went to see him.

Q. What other topics did you talk about?

A. Politics and the country generally.

Q. Did you?

A. I think we did; yes.
Q. You think you did?
A. I think we did; yes.
Q. Do you think you went there for that purpose?
A. I don't know about that; we spent a very pleasant evening.

Redirect examination:

Mr. DAVIS: Up to the time you called on Jones had you any knowledge of the Plainview or Elgin bonds or intention of buying them?
A. Oh, we had a knowledge of them; yes.
Q. Had you any intention of buying them?
A. We had not at that time; no.
Q. The phrase that Judge Wilson has used in his questions to you, do you understand that phrase to refer to the Plainview and Elgin bonds or to the bonds of the other towns that you had negotiated for?
A. What question did he ask me?
Q. Over and over again he used "these bonds" in question.
A. Oh, it is the bonds of all the towns; of Chatfield, Pine Island, Zumbrota—the whole batch of them.
Q. Plainview and Elgin, too?
A. Yes.
Q. The substance of it is this, Mr. Ilsley, that you got 35,000 dollars of the bonds of each of those towns by purchase?
137 A. Yes; that is it.
Q. Then, afterwards, in dealings you occasionally bought some of those bonds back after you had disposed of them?
A. That is it; yes.
Q. And it is possible that a few thousand dollars of bonds that you had never anything to do with by original purchase came into your hands?
A. That is it; yes.
Q. Now, can you tell me about how many thousand or how many of those bonds which were not included in your original purchase ever came into the hands of Marshall & Ilsley?
A. Well, I don't think more than 2,000 or 2,500 of the Elgin, and perhaps 3,000 to 5,000 of Plainview.

(Signed) C. F. ILSLEY.

Subscribed and sworn to before me this 13th day of April, 1885.
[SEAL.] W. E. STORY,
Notary Public, Milwaukee County, Wisconsin.

NOTE.—It is admitted that where the witness in the foregoing deposition speaks of "these bonds," or of the opinion which he obtained from ex-Chief Justice Dixon as to the validity of these bonds, that he refers to the bonds of the towns of Plainview and Elgin as well as the bonds of the other towns referred to.

138 EXHIBIT "Y."

STATE OF MINNESOTA:

District Court, County of Wabasha.

GEORGE W. HARRINGTON, Plaintiff,
against
THE TOWN OF PLAINVIEW *et al.*, Defendants.

SIR: Please take notice that the plaintiff herein appeals to the supreme court of said State from that certain judgment of said district court rendered and entered herein on the 15th day of March, A. D. 1879, and from the whole thereof.

Dated September 12th, 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

To Messrs. Wilson & Gale, attorneys for defendants, and Charles J. Stauff, clerk of said district court.

STATE OF MINNESOTA, }
County of Winona, } *ss:*

Robert Taylor, having been first duly sworn, on oath says that on the 17th day of September, 1879, at Winona, in said county, he served the within notice of appeal upon Messrs. Wilson & Gale, the attorneys for the defendants in the action therein entitled, personally by delivering to and leaving with them at their office, in Winona aforesaid, a true and correct copy thereof.

ROBERT TAYLOR.

Subscribed and sworn to before me this 12th day of September, 1879.

[NOTARIAL SEAL.] O. B. GOULD,
Notary Public.

(Endorsed:) Notice on appeal. Charles J. Stauff, clerk.

139 Know all men by these presents that we, George W. Harrington, as principal, and D. R. French and R. Burchard, as sureties, are held and firmly bound unto the defendants above named in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, or assigns; for the payment whereof, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of September, A. D. 1879.

The condition of this obligation is such that whereas the said plaintiff has appealed to the supreme court of the State of Minnesota from that certain judgment rendered and entered in said action in and by the said district court on the 15th day of March, A. D. 1879, from the whole thereof:

Now, therefore, if said plaintiff (the appellant) shall pay all costs and charges which shall be awarded against him on such appeal and abide the judgment of the said appellate court herein, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 12th day of September, A. D. 1879.

GEORGE W. HARRINGTON. [SEAL.]
D. R. FRENCH. [SEAL.]
R. BURCHARD. [SEAL.]

Signed, sealed, and delivered in presence of—
CHARLES BUTTS.
FRANK E. HARRINGTON.

All residents of Plainview, Wabasha county, Minn.
(Acknowledgement.)
(Justification.)

STATE OF MINNESOTA, } ss:
County of Winona, }

Robert Taylor, being first duly sworn, on oath says that on the 13th day of September, 1879, he served the within bond on Wilson & Gale, attorneys for defendants in the action therein entitled, by delivering to and leaving with them a true copy thereof on said day at their office, in Winona, in said county.

ROBERT TAYLOR.

Subscribed & sworn to before me this 13th day of September, A. D. 1879.

[NOTARIAL SEAL.] WM. A. ALLEN,
Notary Public.

Certificate of clerk of district court.
" " supreme court.

140 EXHIBIT "Z."

Wabasha County District Court.

THE TOWN OF ELGIN
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated as a fact, subject to the objection by defendant that the same is immaterial, that of the following judgments of the United States circuit court for the district of Minnesota in evidence the following have been paid by the plaintiffs at the dates hereafter stated.

As to the town of Elgin:

Judgment of October 11th, 1881	$1,696 85
Paid March 17th, 1883.	
Judgment January 10th, 1883	2,853 05
Paid June 30th, 1883.	
Judgment June 10th, 1883	1,443 91
Paid June 30th, 1883.	

As to Plainview:

Judgment October 11th, 1881	1,746 98
Paid October 12th, 1883.	
Judgment January 10th, 1883	4,154 08
Paid June 21st, 1884.	
Judgment January 10th, 1883	1,717 31
Paid April 1st, 1883.	
Judgment June 7th, 1883	2,595 57
Paid April 9th, 1885.	

KELLOGG & EATON AND C. K. DAVIS,
Plaintiff's Attorneys.
THOMAS WILSON, *Defendant's Attorney.*

141 EXHIBIT "1."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't,
and
THE TOWN OF ELGIN, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Be it remembered that on this fourth day of April, A. D. 1885, personally appeared before me, John Gray, a notary public within and for the county of Cook and State of Illinois, Albert Keep to testify on behalf of the defendant in the above-entitled causes.

And the said ALBERT KEEP, having been first duly sworn to testify the truth, the whole truth, and nothing but the truth in the causes aforesaid, did depose and say as follows, to wit:

Direct examination by Judge WILSON:

Question. What is your name, age, and place of residence?
A. Albert Keep; I am fifty-eight years old; residence, the city of Chicago.

Q. Are you, and, if you are, how long have you been, president of the Chicago & Northwestern Railway Company?

142 A. I am and have been since June, 1873.

Q. In May, 1878, was Marvin Hughitt the general manager of that company?

A. I believe he was in that year. Mr. Hughitt was general superintendent for some years before he was appointed general manager. I don't remember the year in which his title was changed. I could ascertain.

Q. Was J. B. Redfield in that month and in that year connected with this road; and, if so, what office did he hold?

A. He held the office of auditor.

Q. Was M. M. Kirkman then connected with this road; and, if so, what was his office?

A. He was connected with the road. His office was local treasurer of the company.

Q. Is Mr. Hughitt and is Mr. Kirkman and is Mr. Redfield still connected with the Northwestern railway in the same capacity?

A. Mr. Hughitt is still with the Northwestern Company and is now general manager of the company. I am not certain whether his title was general manager in 1878. If not, it was general superintendent. Mr. Redfield is still connected with the company as auditor. He held the same office in 1878. Mr. Kirkman is still connected with the company. His present official title is that of comptroller of the company. In 1878 he was local treasurer. The duties of comptroller are the same as when he was local treasurer; no change in his duties.

Q. All of these men have been continuously with the company ever since?

A. They have been.

Q. Do you remember a meeting had at Rochester, in the State of Minnesota, in May, 1878, at which was present yourself, Mr. Hughitt, Mr. Redfield, George W. Van Dusen, C. T. Benedict, and Thomas Wilson?

A. I do remember such a meeting.

Q. You may state whether at that meeting any contract or arrangement was entered into by and between George W. Van Dusen, representing the Plainview Railroad Company, and the Chicago and Northwestern Railway Company.

Counsel for plaintiff objected to the question as immaterial.

A. We did enter into such a contract on the tenth day of May, 1878.

The copy herewith presented, marked "Exhibit A," it is agreed may be connected or attached to this deposition as a part thereof, subject only to the objection of the materiality of such evidence, but no objection is made because this is a copy and not the original, and the same is offered in evidence; to which counsel for plaintiffs

143 object on the ground that it is immaterial, but not because it is a copy.

Q. The contract of which "Exhibit A" herewith presented is a copy is, as you believe, the contract which was there reduced to writing at that time?

A. I believe it is a copy of it. The original is in this building; if you would like to see it I can have it brought in.

Q. After this contract was entered into at that time did the Chicago and Northwestern Railway Company, in pursuance of that arrangement, go on and advance money to aid in the building of that road?

Counsel for plaintiffs objected to the question as immaterial.

A. The Northwestern Company did advance money for that purpose.

Q. Did they advance that money relying on the contract made at that time that they should have the assets and especially the bonds of these towns as part security for money so advanced?

Counsel for plaintiffs objected to the question as immaterial.

A. We did.

Q. After that time did George W. Van Dusen and C. T. Benedict act under your direction in going on and taking the several steps and doing the several things necessary to complete that road and secure and obtain those bonds?

Objected to as immaterial by counsel for plaintiffs.

A. They did go on under our directions to fulfill all the obligations and secure the building of the line, and under our direction built it.

Q. And did they also, under your direction when those bonds had been, as you believed, earned, secure the bonds and send them on to you for you?

Counsel for plaintiffs objected to the question as immaterial.

A. They did. Perhaps I ought to state my recollection is that the bonds of the towns of Viola and Elgin were received through the hands of Mr. Benedict. That is my impression. The town of Plainview, after the road had been completed, was enjoined from issuing the bonds, which made considerable delay, but the injunction was dissolved, and we afterwards received the bonds of that town. All those bonds came to our hands and into our possession as in fulfillment of this contract that has been referred to here.

144 Q. At that meeting in Rochester, above referred to, in May, 1878, was Thomas Wilson present, as the attorney of the Northwestern Company, advising you and the other officers of the company as to the validity of or the regularity of the steps taken in getting the right of way and in securing these bonds?

Counsel for plaintiff objected to the question as immaterial.

A. He was.

Q. Were there present on that occasion what purported to be and what you believed to be certified copies of the several papers which

had been filed and of the several orders which had been made and of the steps taken and acts done in order to secure those bonds?

Counsel for plaintiffs objected to the question as incompetent and immaterial.

A. My impression is such papers were present. I don't know that I could positively testify to a personal examination of the papers, but I inquired very carefully into the facts in regard to this aid that the towns had promised.

Q. Had Mr. Wilson at that time, as your attorney and at your instance, examined the law and the proceedings under which these bonds were to be issued and advise you as to the legality of the steps taken and the right to the bonds in case the road was completed as proposed?

Counsel for plaintiffs objected to the question as immaterial.

A. He did.

Q. What did he state to you?

Counsel for plaintiffs objected to the question as immaterial.

A. He stated to me that the bonds of the town of Plainview were issued in pursuance of a petition by a majority of the tax-payers of the town in accordance with the law of the State of Minnesota, and that the proceedings were all regular and in every respect in compliance with the law.

Q. Did he or did he not state to you that if that road was completed within the time and in the manner set out in the proposition made to those towns, and the bonds of those towns issued in pursuance of that proposition, that such bonds would be valid and legal and binding on the towns?

Counsel for plaintiffs objected to the question as immaterial.

A. He did.

Q. Did you then rely on and believe that advice to be correct and enter into this contract in pursuance of that?

145 Counsel for plaintiffs objected to the question as immaterial.

A. I did.

Q. Did you, relying on this advice and believing these things to be legal, and relying on this contract made with you by Mr. Van Dusen, go on on behalf of the Northwestern Company subsequently and furnish the money to build and complete this road?

Counsel for plaintiffs objected to the question as immaterial.

A. We did.

Q. Had you any doubt whatever when you did these things, or had any of the officers of the Northwestern road, so far as you know, who were associated with you any doubt whatever when you did these things, that these proceedings were legal, and that you were legally entitled to these bonds when you obtained them?

Counsel for plaintiffs objected to the question as immaterial.

A. I had no doubt whatever about it. I believed the bonds were legally issued. So far as I know, none of the officers had any doubt as to the validity of the bonds.

Q. And you got them solely in pursuance of the arrangement aforesaid and on account of advances by you made, as you have stated?

Counsel for plaintiffs objected to the question as immaterial.

A. We did.

Q. After that time did you sell those bonds—the Northwestern Company?

A. We did sell them.

Q. Those bonds were delivered to Mr. Kirkman, were they not, or were they, by Mr. Benedict or when sent by express?

A. I believe they were all delivered by Mr. Kirkman. It is possible that some of them were delivered at my desk and I handed them to Mr. Kirkman, but they all reached him.

Q. You were present and cognizant of all the steps taken—that is, in the delivery of those bonds?

A. Yes, sir.

Q. You do, do you not, pay attention to all the financial matters of the company, so that you knew what was being transacted?

A. Yes, sir; all such matters as that; everything relating to bonds or securities held or owned by the company.

Q. To whom did you sell those bonds?

A. My recollection is they were sold to Terrill Thomas, of Baraboo.

146 Q. Wisconsin?

A. Wisconsin.

Q. Do you know whether, before he purchased these bonds, he had himself gone into Minnesota and made examination and enquiry as to the steps taken to secure them?

A. I have no doubt whatever that he went there for that purpose. I was so informed and I believe he *do* go. I did not accompany him.

Q. But were you so informed by him?

A. I think so; I believe so. I have no doubt whatever.

Counsel for plaintiffs moved to strike out the answer as hearsay.

Q. I understood you in a previous answer to say that you knew that the bonds of the town of Plainview were issued in pursuance of a petition signed by the tax-payers rather than under an election by the electors. Did you know the same facts as to the town of Elgin?

A. I believe I did.

Q. All these matters were spoken of and discussed at that meeting at Rochester, were they not?

Counsel for plaintiffs objected to the question as immaterial.

A. Oh, yes.

Q. Mr. Keep, in the sale or transfer of these bonds who was it on the part of your company that made the negotiations?

Objected to by counsel for plaintiffs as immaterial.

A. The terms of the sale were fixed by me. The delivery of the bonds was by Mr. Kirkman in pursuance of directions he received from me.

Q. But all was either done by you or under your direction?

A. Yes, sir.

Q. In the transfer of those bonds had you or had you not any purpose or view whatever to get them into the hands of anybody against whom the towns would not have just as valid a defense as they would against your company?

Counsel for plaintiffs objected to the question as immaterial.

A. No such question entered into the sale of the bonds at all. We had no object except to get our money for the bonds, reimburse ourselves as far as we could from that source for the moneys we had expended in the building of the road.

Q. Had you any object whatever in view to prevent the town of Plainview or the town of Elgin from having any defense they would have against you?

147 Counsel for plaintiffs objected to the question as immaterial.

A. We had no such object.

Q. All these bonds, as I understand you, were sold to Mr. Thomas?

A. That is my recollection; I can ascertain that. (Witness refers to paper.) The bonds of Plainview were sold to Terrill Thomas July 10, 1879. The bonds of Elgin were sold to Terrill Thomas, $5,000 of them June 28, 1879, and $35,000 July 10, 1879.

Q. Mr. Richard A. Jones, or, as he is named in another deposition in this case, Dick Jones, was not your attorney, was he, touching this Plainview railroad at all?

A. He was not.

Q. I mean he was not the attorney for the Northwestern Company?

A. He was not.

Q. Mr. Benedict did certain matters in the premises in pursuance of this contract entered into May 10, 1878, but besides him had you any attorney but the Mr. Wilson before referred to?

A. I had not. It was stipulated in the contract that Mr. Benedict, I think, should do certain things. He had done certain things at the time we obtained control of the company, but we had no other attorney except Judge Wilson.

Q. Mr. Van Dusen before he sold you had had Mr. Jones retained in this matter, as you understand, had he not?

A. I understand that to be the case.

Q. After these bonds came into your hands, as you have above stated, or to the treasury of the Chicago & Northwestern Railroad

Company did you or did you not do with them and sell and transfer them for and on behalf of the Chicago & Northwestern Company?

Objected to by counsel for plaintiffs as immaterial.

A. I did.

Q. Was there any action after they came to your hands, whatever, taken by the Plainview Railway Company or by any person except by the officers of the Chicago & Northwestern Railroad Company?

Objected to by counsel for plaintiffs as immaterial.

A. None whatever except by the Chicago & Northwestern Company.

Q. You felt that on account of the matters that you have before narrated that the Northwestern Company had a perfect right to them and to control and dispose of them as it saw fit, did you not?

A. Yes, sir; that the Northwestern Company owned them absolutely.

148 Q. Did you ever hear one word of objection to the issuance of these bonds from any source or by any person until after this road was fully completed in pursuance of the terms of the proposition made to the towns?

Objected to by counsel for plaintiffs as immaterial.

A. I never did.

Q. Was or was not a form of these bonds drawn up and printed here and sent up there to be executed?

Objected to by counsel for plaintiffs as immaterial.

A. I believe that is the case. That is my recollection.

Cross-examination by Gov. DAVIS:

Question. Mr. Keep, while the Chicago & Northwestern Railway Company were negotiating for and when it obtained these bonds were not Messrs. Redfield and Kirkman officers in the Plainview Railroad Company?

A. I believe they were not while we were negotiating. The negotiation I refer to is this contract.

Q. Certainly.

A. Which has been put in.

Q. Were they not such officers when the Northwestern Railway Company obtained these bonds?

A. I think they were when the Northwestern obtained the bonds.

Q. What office did Mr. Redfield hold in the Plainview Company at that time?

A. I am not positive that he held any office except that of director. The old directors of the Plainview Company resigned, and it was understood that directors acceptable to the officers of the Chicago & Northwestern Railway Company should be elected in their places, which was done. In pursuance of that Mr. Redfield became a director of the company. I do not remember that he held any other office; he may have been appointed secretary.

Q. What office did Mr. Kirkman hold at that time in the Plainview Railroad Company?

A. He was first elected a director and, I think, afterwards treasurer.

Q. How long after the execution of "Exhibit A" and how long before the bonds were finally delivered to the Northwestern Company did these resignations and substitutions in the directory take place?

A. I believe the resignations were on the 10th day of May, the same day this contract was executed. I can ascertain that positively by sending for the record book, if it is important; I prefer to send after the book if it is important, but I believe the resignations were on that day.

149 Q. Those resignations and substitutions were part and parcel of the negotiations which resulted in "Exhibit A?"

A. Yes, sir; the Northwestern Company was unwilling to advance any money for the building of the road unless they had control of the direction.

Q. How much money did the Chicago & Northwestern Railway Company advance to build the Plainview road?

Counsel for defendant objected to the question as incompetent and immaterial.

A. I could not state that amount positively here. If it is important I think probably an examination of our books will show.

Q. Can you state it approximately?

A. I can make this statement, that the Chicago & Northwestern Railway Company received the proceeds of $100,000 of mortgage bonds placed on the road; a mortgage was made to the amount of $100,000 and $100,000 of bonds issued. Those bonds were sold and the proceeds were applied to repaying to the Chicago & Northwestern Company a part of the money they had advanced for the construction of the road. The proceeds of the bonds issued by the towns were also credited to the Plainview Company, and at the time the Plainview was sold to the Winona & St. Peter railroad all the funds of the Plainview Company had been used, with the exception of $9,700, which stood to the credit of the Plainview Company at that time. I could not say with accuracy, but I presume this $9,000 has been used since that time in adding to the facilities of that company.

Q. What amount of money did the first-mortgage bonds yield to the Northwestern Company?

Which question was objected to by counsel for defendant as incompetent and immaterial.

A. $88,083.33.

Q. You sold the town bonds to Thomas for 80 cents under par, did you?

A. We did.

Q. And the money which resulted from the mortgage bonds and the town bonds went into the construction of the road?

A. Yes, sir; the Chicago & Northwestern Company was reimbursed for the money that it had advanced.

Q. To aid *to* the construction?

A. Yes, sir.

Q. I presume, Mr. Keep, that the Chicago & Northwestern Company had advanced no money for this road before the contract was made, had it?

150 Objected to by counsel for defendant.

A. Previous to the making of the contract?

Q. "Exhibit A."

A. I have no recollection of any expenditure previous to that.

Q. You do not undertake to say, Mr. Keep, that you were actually present when those bonds were delivered to Mr. Kirkman or when they came to him by express, do you?

A. I cannot remember the precise method of delivery, but I know I was informed in regard to the delivery, and I think the bonds of Plainview were delivered on my own desk and that I took them in to Mr. Kirkman myself. I knew all about it at the time.

Q. How long after May 10th—the date of "Exhibit A"—was it that Mr. Redfield and Mr. Kirkman were elected directors of the Plainview Company?

A. They were elected directors of the Plainview Company on the 10th—the same day this contract was made.

Q. The resignation of the old directors and the election of new directors, suitable to your company, all took place on the day of the date of "Exhibit A," and as part and parcel of that proceeding?

A. Yes, sir.

Q. When these town bonds came into the possession of Mr. Kirkman was he not at that time the treasurer of the Plainview Company?

A. Yes, sir; I think he held the title of treasurer of the Plainview Company. The Plainview Company, however, never had a dollar in money except such as was advanced by the Chicago & Northwestern. Mr. Kirkman was at that time local treasurer of the Chicago & Northwestern Company.

Q. Stationed where?

A. Stationed here.

Judge WILSON:

Question. At Chicago?

A. Yes, sir; in this building.

Gov. DAVIS:

Question. Mr. Keep, were you ever an officer of the Plainview Company?

Counsel for defendant objected to the question as incompetent and immaterial.

A. You say ever?

Q. Yes.

A. I was not elected an officer of the company on the 10th of May, I think. I believe that Mr. Van Dusen was continued as president of the company, but I was elected a director.

Q. On the 10th of May?

A. Of the Plainview Company on the 10th of May, and my
151 impression is that at the annual election, at a later date, I was elected president of the Plainview Company.

Q. The same year?

A. I think not.

Q. When you negotiated these bonds to Thomas were you the president of the Plainview Company?

A. I could not answer that without reference to the books. I will send for them if you wish to know.

Q. I wish you would.

A. (Book produced and referred to.) June 4, 1879, I was elected president. I was not president of the Plainview Company when I gave Mr. Thomas an option for the purchase of the bonds at that price. At the time he actually took the bonds and availed himself of the option I had been elected president. The bonds were actually delivered to Thomas after I became president of the Plainview Company, but the terms of sale were agreed to before that—that is, the price. I cannot tell how many weeks I had given him the option for. He wanted to look to see if he could find purchasers, and I agreed to take 80 per cent. for them within a given time, and he finally took them at that. Now, when I gave him that option and that price I was not president of the Plainview Company. When he took the bonds and paid for them I had been elected.

Q. When you gave Mr. Thomas his option you were a director of the Plainview Company, were you not?

A. Yes, sir.

Q. At what date did you give him that option, as near as you can state?

A. I don't think I can state, but I think it was not very long after we received the bonds. I can give the dates when we received the bonds, and I think the option was given not very long after that.

Q. Give the date when you received the bonds.

A. The credit of the town of Elgin on our books for the bonds was made January 31, 1879. There was a delay in the case of Plainview. We did not receive those bonds until the 10th of July, 1879. The injunction had been removed some time before that. There was some delay in the execution of the bonds after the injunction was removed. They had to be sent up and signed and delivered afterwards.

Q. Didn't you receive those Plainview bonds about March 15, 1879, Mr. Keep?

A. Yes; we did. The date I gave was wrong. The Plainview bonds are credited on the 31st of March, 1879, but may have been received on the 15th. The 31st of March was when we closed the books for the month. Elgin is credited on the 31st of January, 1879, and Plainview on the 31st of March, 1879. The credits were made on the last day of the month.

152 Q. As near as you can recollect, how long was it after you received these bonds that you gave Thomas his option?

A. I have nothing to fix these dates by. My impression is that not very much time elapsed after we received the bonds before I gave him that option.

Q. How long an option was it?

A. I don't think I could state the precise length of that option, but I am certain that it was not an unlimited option, but that it was understood and stated to him that if within a reasonable time he decided to take them at that, that he could have them. I think that was the substance of the agreement, but it was not to be received as an offer that he might take them at any time in the future.

Redirect examination by Judge WILSON:

Question. Is Mr. Kirkman here now?

A. He is not. Mr. Kirkman went to New Orleans perhaps three weeks ago and has not returned yet.

Q. The arrangement or agreement made between yourself and other officers of the Northwestern road, on one part, and Mr. Van Dusen, representing the Plainview road, on the other part, was made, or was it not, prior to the time of the resignation of the old officers and the election of the new?

A. Certainly. The terms were agreed upon definitely before there were any changes. The changes were a result of that agreement.

Q. In your direction to Mr. Van Dusen, among other things, to obtain and transmit to you or to this place those bonds, did you or did you not act for and in behalf of the Chicago & Northwestern Railway Company?

Counsel for the plaintiffs objected to the question as immaterial and calling for the conclusion of the witness.

A. Yes, sir; exclusively on behalf of the Chicago & Northwestern Railway Company.

Q. In your negotiation with and sale of those bonds to Thomas did you or did you not act on behalf of the Chicago & Northwestern Railway Company?

Counsel for the plaintiffs objected to the question as immaterial and as calling for the conclusion of the witness.

A. Exclusively on behalf of the Chicago & Northwestern Railway Company.

Q. You have stated, I believe, have you not, in your previous examination, that after the advancement of the moneys under this contract, Exhibit "A," to build that road that the Northwestern Company was absolutely entitled to these bonds?

A. Certainly. That was the only inducement to the Northwestern Company to make the advance.

153 Q. Did you or did you not thereafter act on the theory that the Northwestern Company had the sole and exclusive right to obtain and control these bonds?

Counsel for plaintiff objected to the question as incompetent and immaterial.

A. We certainly did very definitely understand that; that was the very basis of our trade.

Q. Did or did not Mr. Kirkman do any act, except under you, with reference to these bonds?

Counsel for plaintiffs objected to the question as immaterial and incompetent.

A. He had no authority, and he did no act except as directed by me.

Q. You state that you had given Mr. Thomas an option on those bonds?

A. Yes, sir.

Q. Did he or did he not, according to your best recollection, after that option was given and before the bonds were delivered, go up into Minnesota to look after the matter?

A. I believe he did go there; that is my recollection.

Recross-examination by Gov. DAVIS:

Question. Mr. Keep, you know nothing about Thomas going to Minnesota or what he did in Minnesota except what Thomas told you, do you?

A. Yes, sir; I think others told me of his being there. I was not present with him, but I think I know it as I know Grover Cleveland was elected President of the United States; I didn't count the votes, but I believe it. And I do know that Mr. Thomas went to Minnesota, besides what he told me.

Q. What you know from information that you consider reliable?

A. Yes, sir; that is it.

It is hereby stipulated by and between the attorneys for the respective parties herein that this deposition shall be reduced to typewriting by a type-writer, and thereafter signed by the witness and certified by the notary, but no objection shall be made to the deposition on account of any informalities in the taking thereof or in the certifying thereof, or in the return thereof, provided it is signed by the witness and certified by the notary.

(Signed) ALBERT KEEP.

STATE OF ILLINOIS, } ss:
Cook County, }

I, John Gray, a notary public in and for the county of Cook and State of Illinois, do hereby certify that on the 4th day of April, A. D. 1885, by agreement of Hon. C. K. Davis and —— Kel-
154 logg, Esq., attorneys for the plaintiffs, and Hon. Thomas Wilson, attorney for the defendant, personally appeared before me, at the general offices of the Chicago & Northwestern Railway Company, in the city of Chicago, county of Cook, and State of Illinois, Albert Keep, a witness to testify on behalf of defendant in cer-

tain causes now pending in the district court of the county of Wabasha, in the third judicial district of the State of Minnesota, wherein The Town of Plainview is plaintiff and The Winona & St. Peter Railroad is defendant, and wherein The Town of Elgin is plaintiff and The Winona & St. Peter Railroad Company defendant.

And I hereby further certify that the aforesaid witness was first duly sworn to testify the truth in relation to the matter in controversy in the cause aforesaid, so far as he should be interrogated, and that the testimony of said witness was reduced by me to writing and first carefully read to said witness and the same subscribed to by said witness in my presence.

In testimony whereof I hereunto set my hand and affix my notarial seal this 6th day of April, A. D. 1885.

[SEAL.] (Signed) JOHN GRAY,
Notary Public.

155 "EXHIBIT A."

This is to certify that Geo. W. Van Dusen has, under and in accordance with the laws of the State of Minnesota, organized a corporation under the name of the Plainview Railroad Company, for the purposes fully set forth in the articles of incorporation filed in the office of the secretary of state of said State and copied into the records of said company, reference to which copy or original articles for a more full description of the purposes as therein set forth is hereby made, and has obtained aid, to be paid on bonds from the town of Plainview fifty thousand dollars, and from the town of Elgin forty thousand dollars, and from the town of Viola ten thousand dollars, and has made some progress in procuring right of way and other necessary acts and things requisite for the completion of said work, and has expended of his own means several sums and amounts of money, but from various causes appertaining to his own private business affairs is desirous of being relieved of further prosecution of the work: Now, to insure the completion thereof in good faith to the public, whose interests have become identified with the enterprise, he has proposed to the Chicago & Northwestern Railway Company, a corporation created and existing under the laws of the States of Illinois and Wisconsin, and owning and operating the Winona & St. Peter railway, in the said State of Minnesota, with which this proposed railroad connects near a station named and known as Eyota, to transfer all his rights and interests in said company, all of the corporate rights of the same, all of the aid above referred to, all property and franchises acquired or to be acquired by said corportion or by himself for the benefit of the same, with the following additional conditions, which are accepted and agreed to by the said Chicago & Northwestern Railway Co.: The said Van Dusen is to keep in employ, for the purposes for which they are engaged, C. T. Benedict and D. B. Waterman, and is to pay them for their services until the road is completed and the purposes for which they have been employed are perfected; he is to procure the right of way, either by purchases or condemnation, for the whole line, paying all

expenses incurred for procuring the same, whether by condemnation or purchase, and oversee and superintend, so far as he may be required so to do, the disbursements of moneys for the perfecting of right of way and completion of the road according to his best judgement and the wishes and advice of the party purchasing as well as though the property continued to be in his possession, and for the transfer and moneys advanced by him as above stated he is to be paid in money the sum of fifteen thousand dollars and five of
156 the ten bonds (of one thousand dollars each) of aid voted by the town of Viola, which payments when made are to be in full satisfaction of all claims for moneys and expenses heretofore paid by him for the purposes above expressed and defined; and also he is to have all sums that he has paid or shall be required to pay for engineers' expenses or that he has paid or will have to pay to the owners of land or others interested therein for right of way, both by purchase and condemnation, which said sums of money the said Chicago & Northwestern Railway Co. agrees to pay and to assign to said Van Dusen any right or claim the first-named corporation may have to five thousand dollars or the bonds voted by the town of Viola, and said Van Dusen is to pay all debts and liabilities which had been contracted or incurred by the said Plainview Railroad Co., and all sums due or to grow due to said Waterman and Benedict for or on account of any services by them rendered or to be rendered for the said company or for the benefit thereof in and about the matters hereinbefore stated.

In witness whereof the parties hereto execute this agreement this 10th day of May, A. D. 1878.

(Signed) GEO. W. VAN DUSEN.
(Signed) ALBERT KEEP,
Pres't Chicago & Northwestern Railway Co., for said Company.

Received May 28th, 1878, on the within contract $10,000 in part payment of the within-mentioned $15,000. See auditor's bill No. 116,845.

(Signed) GEO. W. VAN DUSEN.

157 EXHIBITS "2" and "3."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.
and
THE TOWN OF ELGIN, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.

It is hereby stipulated in each and both of the above-entitled ac-

tions that the depositions below of T. Thomas, of Baraboo, in the State of Wisconsin, and G. W. Van Dusen, of Rochester, in the State of Minnesota, shall and may be used in each of the above-entitled actions without repeating the same.

T. THOMAS, a witness called and sworn on part of the defendant, testified as follows:

Direct examination by Judge WILSON:

Question. What is your name, age, and place of residence?

A. Terrill Thomas; age, fifty-nine; place of residence, Baraboo, Wisconsin.

Q. Are you the T. Thomas who went with Mr. Ilsley to Chatfield and Rochester and other places to look after certain bonds which he proposed to purchase of the Chicago & Northwestern Railway Co. or of you?

A. Yes, sir.

Q. Was Mr. Hanks with you when you went on that trip?

158 A. Yes, sir.

Q. Who is this Mr. Hanks?

A. Cashier of the State Bank of Madison.

Q. Who owned the State Bank of Madison?

A. Mr. Marshall, Mr. Ilsley, and Mr. Hanks.

Q. Was the trip made at that time with a view to look after the bonds of certain towns?

A. Yes, sir.

Q. And to ascertain whether they had been issued properly and whether there was any objection to them by the people of those towns?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. About what time was this trip made?

A. On the 19th of June I left home and came back on the 24th.

Q. Of what year?

A. 1879.

Q. Did you during that trip call on Richard Jones, commonly called Dick Jones, of Rochester, with those gentlemen?

A. Yes, sir; I did.

Q. Did you call on him more than once?

A. Not in company with those gentlemen.

Q. At that time, according to your best recollection, was George W. Van Dusen, of Rochester, with you?

A. I have forgotten about that. I think he must have been, from what he says in connection with it, but it has escaped me.

Q. You had gotten from Mr. Keep, president of the Chicago & Northwestern Railway Co., an option on those bonds?

A. Yes, sir.

Q. An option of how long?

A. Well, in the interview that I had with him first in regard to this matter I told him it would require thirty days to make an ex-

amination that would induce me to have anything to do with them, and he said he would give it to me.

Q. After you got that option did you, before getting the bonds, go yourself to make inquiry as to the issue of those bonds?

Objected to as irrelevant and immaterial.

A. I wrote and got some information and went and got other information to the majority of towns on the line of the road.

Q. You first wrote, you say. To whom did you write?

A. I wrote to the town treasurers of the several towns and to the county treasurers.

159 Q. After that time did you, in fact, go and visit the towns?

A. Yes, sir.

Q. For the purpose of inquiring as to the steps taken in the issuance of the bonds or before they were issued?

Objected to as irrelevant and immaterial.

A. I wanted to ascertain the general sentiment of the people in regard to the issuance of those bonds and the extent of dissatisfaction, if there was any.

Q. Did you find any dissatisfaction, or did you find any objection whatever to those bonds?

Objected to as irrelevant and immaterial.

A. Less in the case of all those towns than I have found in the case of other towns issuing bonds for the same purpose—much less.

Q. Did you or did you not know, before you got those bonds, that the bonds of the towns of Plainview and Elgin were issued in pursuance of a petition signed by the tax-payers rather than a vote of the electors of those towns?

A. I had been advised of that by Mr. Keep—that a copy of the law of Wisconsin in regard to the voting or petitioning of bonds had been transferred or engrafted into the constitution or laws of the State of Minnesota.

Q. What I wish to know is, did you, before you got those bonds, know that the towns of Plainview and Elgin had issued their bonds in pursuance of a petition signed by the tax-payers?

A. Yes, sir.

Q. Did you find any objection whatever, on your personal inquiry, as to those bonds, as to their legality or otherwise?

Objected to as irrelevant and immaterial.

A. I have found a little objection in a few instances.

Q. A little objection as to what—as to the legality?

Objected to as irrelevant and immaterial.

A. No; the legality was not questioned at all; it was in respect to the per cent. of tax imposed upon some towns being more excessive than that imposed upon other towns.

Q. Were those inquiries of which you have just spoken made by you before you got the bonds?

A. Yes, sir.

Q. Before those bonds were sold to Marshall & Ilsley did Mr. Ilsley and Mr. Hanks come up and make the trip?

A. They made the trip to all the towns except Plainview and Elgin.

Q. Did they make inquiry, before they bought those bonds, of any attorneys as to the validity of those bonds?

A. Yes, sir.

Q. Of whom?

160 A. Gregory & Pinney, of Madison.

Q. Of whom else?

A. Judge Dixon, of Milwaukee.

Q. Is that Judge Dixon, the ex-chief justice of Wisconsin?

A. Yes, sir; we also relied very much upon your opinion.

Q. When you were dealing in those bonds, and after the inquiries and information of which we have spoken, had you any doubt whatever as to the validity of those bonds?

Objected to as irrelevant and immaterial.

A. No, sir.

Q. How long after you came up here yourself, as nearly as you can recollect, was it that Mr. Ilsley and Mr. Hanks came up with you?

A. I think it must have been two weeks, probably, or perhaps three weeks.

Q. Did you fully explain to them, to the best of your recollection, all you knew about those bonds, as to their mode of issue, &c.?

A. Yes, sir; I furnished them the proofs or certified copies in every case.

Q. Do you mean the certified copies of the steps taken preliminary to the issue of the bonds?

A. Yes, sir; the votes, notices, and all the legal steps.

Q. The bonds which Marshall and Ilsley purchased and received last were the bonds of Plainview and Elgin, were they not?

A. Yes, sir; the transactions were separate, though; they were entirely distinct.

Q. They were the last in time, were they not?

A. Yes, sir.

Cross-examination by F. B. KELLOGG:

Question. Do you now or have you since the first of September, 1884, owned any of those bonds, including the bonds of Plainview and Elgin?

Objected to as incompetent and immaterial.

A. No, sir; I have no interest whatever in the bonds.

Q. To whom did you sell those bonds of Plainview and Elgin?

A. They were sold to Marshall and Ilsley.

Q. All of them?

A. Yes, sir; the whole batch was sold.

Q. The ninety thousand dollars of the two towns?

A. Yes, sir; but I made a reservation of a batch of them for my-

self—a few thousand dollars; they made the payment for the whole lot, and I reserved ten or eleven thousand dollars on my own account.

161 Q. Did you sell these?

A. Yes, sir.

A. To whom?

A. To parties in Cincinnati.

Q. Can you give the names?

A. They were sold to the trustee of an estate, I think—minor heirs.

Q. Do you remember the name?

A. Yes, sir.

Q. To whom was the sale made?

A. Charles H. Williams, Cincinnati.

Q. How many thousands?

A. I am not quite certain; I think I sold, on two occasions, perhaps all together six or seven or eight thousand dollars.

Q. To whom did you sell the rest?

A. I sold a portion to Marshall & Ilsley and a portion to Mr. Fitch, of the National Exchange Bank.

Q. When were those sales made by you, as nearly as you can recollect?

A. You mean to Marshall & Ilsley?

Q. Yes, and to the other parties.

A. I think the bonds were delivered to them by the company in July, 1879; I think Mr. Williams must have taken his in September or October.

Q. Of the same year, 1879?

A. I think so. It may have been a little later than that.

Q. Are any of those bonds of Plainview and Elgin owned in the State of Minnesota?

Objected to as incompetent.

A. I don't know as to that.

Q. You say, Mr. Thomas, you sold those bonds; you may explain, as you started to explain, as to what relation to the Chicago & Northwestern Railway Co. you occupied when you sold those bonds—whether you bought and sold or not.

Objected to as incompetent and inconsistent with the stipulations made in this case and the pleadings in this case.

A. I had an option on the batch of bonds referred to—two hundred and fifty thousand dollars, the Plainview and Elgin bonds included—and I was the medium through which they were sold. I would advise a sale and the company would make the reference to their agent at the point of delivery, and they would notify me of that fact. I requested the agent to make the delivery to Marshall & Ilsley, and he received his pay then and there from them.

Q. The agent of whom?

162 A. The agent of the Chicago & Northwestern Railway Co.

Q. The local agent at Madison?

A. I think some of the bonds were delivered at Madison, and in that case they would have been delivered by the local agent at that point.

Q. How much did you give the Chicago & Northwestern Railway Co.?

A. The stipulation was 80 cts. and interest 85 cts. in the case of Rochester, and I was to get my commission and my pay out of any sum I could sell them for over and above the price stipulated.

Redirect examination by Judge WILSON:

Question. You say you kept ten or eleven thousand dollars of those bonds yourself for awhile. Did you keep those of the town of Plainview or of Elgin or of some other towns?

A. I preferred to take the Plainview and Elgin bonds, of all the bonds I had.

Q. Why? Because they were the best bonds?

Objected to as irrelevant and immaterial.

A. Yes, sir; I thought there was the best prospect of those bonds being paid promptly. I thought those towns had the best resources and were the best prepared to make payment promptly.

Q. Is that the only reason why you kept them?

Objected to as irrelevant and immaterial.

A. I believed they were perfectly good and those towns were abundantly able to meet their obligations. I thought it was the best country I struck on the whole line of road.

Q. You stated in answer to a question in cross-examination that the company sent to their agent the bonds to be delivered; let me ask you whether this is the way in which that was done: After you negotiated for the sale of those bonds the company sent to your address the bonds, to be delivered on the payment for them?

A. No; you mistake. They sent a statement of the value of the security and made a notification to me. They made a statement in detail of the securities included and forwarded — to agent at Milwaukee, with the several amounts and the value and the sum total; that was made in full and in detail to their agents, and they gave me a corresponding notice in a letter addressed to me. I would put in appearance at the point of delivery and order the agent to deliver the bonds to Marshall & Ilsley and take his pay, which he did.

Q. And those bonds were sent to Milwaukee to your address and to you, to be delivered on the payment?

163 A. No; I think they were sent to the agent.

Q. To the agent for you?

A. Yes, sir; to the agent for me, and I was notified and put in an appearance and got the pay. I will say, however, that in the case of the bonds of Plainview and Elgin I notified the Chicago & Northwestern Railway Co. of the sale to Marshall & Ilsley and they sent them direct to Marshall & Ilsley.

164 G. W. VAN DUSEN, a witness called and sworn on the part of the defendant, testified as follows:

Direct examination by Judge WILSON:

Question. What is your name, age, and place of residence?

A. George W. Van Dusen; Rochester, Minnesota; age, fifty-eight.

Q. Are you the person who was the president of the Plainview Railway Co. prior to the election of Mr. Keep to that place?

A. I am.

Q. You are the George W. Van Dusen referred to and one of the parties in the contract entered into between George W. Van Dusen and the Chicago & Northwestern Railway Co. in May, 1878, with reference to the purchase of the franchises and properties of the Plainview Railway Co.?

A. Yes, sir.

Q. Was the Plainview railway built while you were the president of the company?

A. It was.

Q. Were you or were you not induced and influenced to build the line of that road by the promises or agreements to issue the bonds of those towns?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. Were you induced and influenced to build it and did you build it relying upon obtaining those bonds?

Objected to as irrelevant and immaterial.

A. I promised to build the road on the condition that they would give me the bonds. As far as building the road is concerned, it was built by the Chicago & Northwestern Railway Company. I did not build the road.

Q. But, so far as you had anything to do with it, were you induced and influenced in your — action securing the building of that road by the promise of those bonds?

Objected to as irrelevant and immaterial.

A. I was.

Q. So far as you know, were the Chicago & Northwestern Railway Company induced and influenced to furnish money to build that road by the promise of those bonds and relying upon those bonds?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir; I think the promise of the issue of the bonds was the inducement that made them take hold of it.

165 Q. After this contract before referred to, entered into between you and the Chicago & Northwestern Railway Company May 10, 1878, did you act for the Chicago & Northwestern Railway Company?

A. I did.

Q. Did Mr. C. T. Benedict act for you after that time in pursuance of this contract?

A. Yes, sir.

Q. In everything he did thereafter or theretofore with reference to this road or to obtaining the bonds for this road was he acting simply as your employé and under your direction?

A. Yes, sir.

Q. When those bonds of the towns of Plainview and Elgin were obtained and forwarded to Chicago were they so obtained and forwarded in pursuance of the contract with the Chicago & Northwestern Railway Co.?

A. Yes, sir.

Q. As you then understood it and as you now understand it did the Chicago & Northwestern Railway Company obtain those bonds on account of moneys they had furnished for the purpose of aiding in the building of that road?

Objected to as irrelevant and immaterial.

A. The bargain I made with them gave them the road and the bonds and everything else; I had no rights.

Q. Was there any object or purpose in the sending of those bonds to them, at the time they were sent to them, to prevent the town of Plainview or the town — Elgin having any defense against those bonds?

Objected to as irrelevant and immaterial.

A. No, sir; not that I know of.

Q. Was it or was it not true that that was done simply, as you understood, in pursuance of the contract entered into between you and the Chicago & Northwestern Railway Company and in pursuance of the rights of that company on account of money furnished?

A. Yes, sir.

Q. On your part was there any desire or intention to prevent those towns or either of them from having any defense whatever against those bonds?

Objected to as irrelevant and immaterial.

A. I never had any such idea.

Q. So far as you know did any officer of the Chicago & Northwestern railway have any such idea?

Objected to as irrelevant and immaterial.

A. Not so far as I know.

Q. Up to the time that road was built and completed was there, as far as you know, any objection made by the people of those towns or by any of the people of those towns to the legality of those bonds or of their issue?

166 Objected to as irrelevant and immaterial.

A. No, sir.

Q. Were you or were you not present when Mr. Thomas, who has

just been examined here as a witness, with Mr. Ilsley, of Milwaukee, and another gentleman, called on Richard Jones at Rochester to inquire about those bonds?

A. I was present at an interview of Mr. Jones with Mr. Marshall or Mr. Ilsley—I don't remember which; it was one of the firm—and some gentleman from Madison, who had a conversation with Mr. Jones in regard to the manner of issuing the bonds of the different towns.

Q. Was Mr. Thomas present at that conversation?

A. He was.

Q. State whether at that conversation the mode of procedure followed in obtaining those bonds was referred to or spoken of.

A. My recollection is that that was the subject discussed, and the manner of proceeding was talked about. Just the conversation that occurred I cannot remember, but that was the subject of the conversation with Mr. Jones, mainly.

Q. And did that conversation refer to the bonds of Plainview and Elgin as well as other towns?

A. I think it did.

Cross-examination by F. B. KELLOGG:

Question. You were president of the Plainview Railway Company from the time of its organization down to some time about the first of June, 1879, were you not?

A. I should think that was about the time.

Q. After the delivery of those bonds?

A. Yes, sir.

Q. The contract you spoke of is that made between you and the Chicago & Northwestern Railway Company, dated May 10, 1878, I suppose?

A. Yes, sir.

Q. In making the contract you acted, did you not, for the Plainview Railway Company?

A. Yes, sir; I acted for the corporation, the Plainview Railway Company.

Q. In taking all the steps preliminary to the issue of the bonds, the making of the petitions, and doing all that was done in the towns of Plainview and Elgin by the railway company you acted for the Plainview Railway Company, did you not?

A. I acted as an officer of the Plainview Railway Company, although I considered myself simply a hired man for the
167 Chicago & Northwestern Railway Company, and carried out that work for them under the laws of our State as an officer of the Plainview Railway Company.

Q. I am speaking of the time prior to the making of this contract?

A. Prior to the making of this contract, of course I acted for the Plainview Railway Company.

Q. And in taking all the steps preliminary to the issuance of the bonds you acted as president for the Plainview Railway Company, did you not?

A. Up to the time of making this contract; yes, sir.

Q. Were you an officer of the Chicago & Northwestern Railway Company?

A. No, sir.

Q. During any of this time?

A. No, sir; I will qualify that just a little, however. You use the term "officer." I will say that I considered myself an employé of the Chicago & Northwestern Railway Company.

Q. Were you an elected officer in any way of the Chicago & Northwestern Railway Company?

A. No, sir.

Q. In carrying out the terms of this contract that you made with the Chicago & Northwestern Railway Company you represented the Plainview Railway Company, did you not?

A. Yes, sir.

Q. In receiving those bonds of the towns of Plainview and Elgin you acted for and on behalf of the Plainview Railway Company, did you not?

A. I suppose it would be considered so in law.

Q. You considered and understood at that time that the bonds of the towns of Plainview and Elgin were issued and delivered, as agreed, to the Plainview Railway Co.?

Objected to as incompetent.

A. Yes, sir.

Q. Did Mr. Benedict represent you and the Plainview Railway Company?

A. He represented me as president of the Plainview Railway Company.

Q. Then the bonds of the towns of Plainview and Elgin, as they agreed to do in their resolutions and petitions, were delivered to the Plainview Railway Company, were they not?

A. Yes, sir.

Q. Did you and Mr. Benedict take the bonds of either town down to Chicago?

A. I think Mr. Benedict procured the bonds of the town of Elgin and the town of Viola and took them down himself and kept
168 possession of them until he delivered them to Mr. Kirkham. I went to Chicago at the same time with him, but I don't think I was present at the delivery of the bonds. I think he delivered them himself.

Q. In speaking of being an employé of the Chicago & Northwestern Railway Company you mean only your employment in carrying out this contract, do you not?

A. Yes, sir.

Q. You were not an employé of the Chicago & Northwestern Railway Company in any other respect; you were not an agent of the Chicago & Northwestern Railway Company?

A. No, sir.

Q. Then what you did in receiving those bonds you did as president of the Plainview Railway Company?

A. I did it in that capacity.

Q. And in carrying out this contract you did the same as president of the Plainview Railway Company?

A. Yes, sir.

Q. Did you understand by this contract with you that when the road was completed and you had performed on your part all that was to be performed you were to get those bonds and turn them over to the Chicago & Northwestern Railway Company?

A. Yes, sir; if I got the bonds I was to turn them over to the Chicago & Northwestern Railway Co.

Q. And you did get the bonds and did turn them over to the Chicago & Northwestern Railway Co.?

A. Yes, sir.

Q. And in doing this you acted as president of the Plainview Railway Co.?

A. Yes, sir.

Q. And acted for the Plainview Railway Co., did you not?

A. Well, I could hardly swear on that point, as I was really acting for the Chicago & Northwestern Railway Co., and if they had ordered me to do anything else I should have felt bound to follow their instructions. I supposed that by my being an officer of the Plainview Railway Co. was a mere matter of form to carry out the law under which we were building the road, and that the real thing itself was that I was acting as a servant of the Chicago & Northwestern Railway Co.

Q. You mean the Chicago & Northwestern Railway Co., pursuant to that contract, was furnishing the money and backing it?

A. Yes, sir.

Q. But the title of the road was the Plainview Railway Co.?

A. Yes, sir; they could not have it any other way.

169 Redirect examination by Judge WILSON:

Question. Is not this, then, the understanding that you had and have, viz., that, as a matter of form, you acted for and represented the Plainview Railway Co., but, as a matter of fact, the Chicago & Northwestern Railway Co., in pursuance of a contract and the advancing of the money to build that line of road, were entitled to receive and take those bonds?

A. Yes, sir.

Q. And, according to your and their understanding, is it not true that there was no right on the part of the Plainview Railway Co. or any one else to divert from the Chicago & Northwestern Railway Co. those bonds after they had so advanced the money to build the road?

A. No; I considered the bonds theirs and no one else's.

Q. According to your understanding, and, so far as you know, according to their understanding, they advanced the money to build the road with this distinct view, viz., they would get those bonds?

Objected to as irrelevant and immaterial.

A. My understanding of the contract I made with them was tha

as president of the Plainview Railway Company. I turned over for a consideration all the rights, title, and interest I had in the Plainview Railway Company, and they took the franchises and whatever I had and agreed to carry out the contract I had made with the towns, and took all the bonds that I might get and all the aid I would get for so doing.

Q. They did furnish the money to build the road, did they not?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. And the road was built in pursuance of the contract with that money so furnished, was it not?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. And those bonds were, in pursuance of that money and the conditions aforesaid and the considerations aforesaid, delivered over to them?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. And the purpose in sending them those bonds was solely to comply with what you understood to be your duty and contract, without any other purpose whatever, was it not?

Objected to as irrelevant and immaterial.

A. Yes, sir.

170 Q. Did the Plainview Railway Company receive any consideration whatever for the delivery of those bonds except the money so advanced and the building of the road as aforesaid?

A. The only consideration that I received as president of the Plainview Railway Company was as stated in the contract between the Chicago & Northwestern Railway Company and myself; there was no further pay than that.

Q. And, as far as you know, did the Plainview Railway Company receive from the Chicago & Northwestern Railway Company one dollar for those bonds except the money which had been advanced before they were issued to aid in the building of the line of road?

A. No, sir.

Recross-examination by F. B. KELLOGG:

Question. Then it was your understanding that under this contract when the Plainview Railway Company got those bonds from the towns it was your duty, as president of the Plainview Railway Company, to turn them over to the Chicago & Northwestern Railway Company for what they had done pursuant to that contract?

A. It was my understanding that when those bonds were obtained, according to the contract I had made with the Chicago & Northwestern Railway Company, they belonged to them. They had fulfilled their part of the contract and that finished my part of the contract.

Q. But unless the Plainview Railway Company got them it was not your understanding that the Chicago & Northwestern Railway Company were entitled to them?

A. No, sir; as I understand the contract that I made with the Chicago & Northwestern Railway Company it was that I did not guarantee to get those bonds, but, if I did get them, they belonged to them.

171 It is hereby stipulated as to this deposition and the deposition of Mr. T. Thomas, just taken, that the same, having been taken in short-hand, shall be reduced to copy in long hand and sent to each of said witnesses for signature, and, when so signed, shall be returned and certified to by O. B. Gould, the notary who administered the oath to said witnesses, and that no objection shall be taken by either party to the mode of taking, signing, certifying, or returning the said depositions or either of them, and that, when so signed and certified, they shall be sent to file with the clerk of the district court of Wabasha county, and shall not be subject to any objection whatever except as stated in said depositions.

172 EXHIBIT "4."

STATE OF MINNESOTA:

District Court, County of Wabasha, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD CO., Def't.

The above-entitled action came on for trial upon the pleadings and the evidence at a regular term of said court held in the city of Wabasha, in said county, on the 25th day of June, A. D., 1885, the Hon. L. W. Collins, district judge, presiding, and was tried by the court, trial by jury having been duly waived by stipulation, and the premises having been considered, and the court, being now sufficiently advised of and concerning the same, finds the following conclusions of fact:

That the plaintiff is, and for more than ten years last past has been, a town and municipal corporation duly created and organized under and by virtue of the laws of the State of Minnesota; that during the years 1878 and 1879 one D. F. Ferguson was the duly elected and qualified chairman of the board of supervisors of said town, and D. G. Wood and Ferdinand Hample were the duly elected and qualified supervisors of said town, and B. H. Gould was the duly elected and qualified town clerk thereof; that the
173 Plainview Railroad Company during all the times hereinafter stated was a corporation duly created and organized under and by virtue of the laws of the State of Minnesota, with power to build a certain line of railroad from the point of junction with the Winona & St. Peter railroad in the county of Olmsted east of the

west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed December 31st, 1877.

That the Winona & St. Peter Railroad Company was during all the times herein stated and now is a corporation duly created and organized under and by virtue of the laws of the State of Minnesota; that on the 22d day of January, A. D. 1878, said Plainview Railroad Company made and delivered to the town clerk of the town of Elgin a proposition in writing, signed by the president and secretary of said company, containing all the statements and specifications required by section four (4), chapter 106, of the General Laws of the State of Minnesota for the year 1877, and stating the amount of bonds of the said town desired to be forty thousand dollars ($40,000), and said town clerk immediately endorsed on said proposition the date of filing, and the same was duly transcribed in his records, and that Exhibit "A" attached to the complaint is a true copy of said proposition; that thereafter and on or about the 22d day of January, A. D. 1878, said Plainview Railroad Company posted up in three public places in said town notice that after a certain day, to wit, after January 29th, 1878, a petition to the supervisors of said town, appended to a copy of said proposition, Exhibit "A," would be presented to the resident tax-payers of said town of Elgin, asking the said supervisors to agree to said proposition filed with said town clerk as aforesaid, a true copy of which notice is attached to the complaint herein, marked Exhibit "B," and to which notice was appended a copy of said Exhibit "A," which said notice, with said proposition, Exhibit "A," — printed and published for two successive weeks in the Plainview News, a weekly newspaper printed and published in the town of Plainview, in said county, the said town of Plainview being the nearest place to said town of Elgin at which a newspaper was then published, no newspaper being then published in said Elgin; that thereafter and within three months after the filing of said proposition with the said town clerk, to wit, on the 28th day of March, A. D. 1878, said railroad company delivered to said town clerk certain petitions, six in number, in form required by section seven (7) of said chapter 106 of the General Laws of 1877; which said several petitions were in the following form, except as to the names appended, which are omitted, viz:

174 "*Petition.*

"To the town board of supervisors of the town of Elgin, in the county of Wabasha and State of Minnesota:

"We whose names are hereto subscribed, being residents of said town and who are assessed for taxes upon real estate in said town, as shown by the last assessment-roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company to which this petition is appended.

"Dated this 30th day of January, A. D. 1878."

To each of said petitions was attached a copy of the proposition made by the Plainview Railroad Company, being Exhibit "A" attached to the complaint herein; that said petitions were filed with said town clerk, and bore the signatures of a majority of the persons residing in said town of Elgin who were assessed for taxes upon real and personal estate in said town, as shown by the last assessment-roll thereof which signatures were verified by the affidavits of the persons witnessing such signatures; that said petitions and signatures thereto were made and obtained under and pursuant to the provisions of section 7 of the aforesaid act of 1877 and not otherwise; that said petitions so signed as aforesaid had appended thereto copies of said proposition, and were filed in the office of the town clerk of the town of Elgin on the 28th day of March, A. D. 1878, and that the same were the only petitions ever presented to said town clerk and the only ones ever made touching said matter or asking the authorities of said town to agree to the proposition of the said Plainview Railroad Company, and that said petitions and section 7 of said act of 1877 and the foregoing premises constituted the only authority had or claimed for the issue of the bonds in controversy in this action; that no election was ever held in said town to authorize the supervisors to agree to said proposition or to issue any bonds of said town or in relation to said matter in any manner whatever, and the parties to this action did at the trial stipulate as a fact, and it is hereby found to be a fact, that the terms and provisions of the statute under which said bonds were issued were in all respects performed and complied with by the said Plainview Railroad Company, and that the proposition submitted under said statute was in all respects complied with, and that said Plainview Railroad Company had, prior to the issuance of said bonds, earned and become entitled to the same, if the law authorizing their issue was constitutional; that there was no election or vote of the electors of said town authorizing the issue of said bonds or any vote by election upon the proposition therefor; that the proceedings had were by and in pursuance of a petition of a majority of the tax-payers of said town, as provided in said statute.

175 It is further found as facts that thereafter and on March 28th, A. D. 1878, said board of supervisors of said town of Elgin, pretending and claiming to act and acting under and by virtue of the foregoing petitions, proposition, proceedings and premises and without any other authority or right whatever, did adopt and place on file in the office of the said town clerk of the town of Elgin a certain resolution, of which a true copy is annexed to the complaint; that said supervisors had no other authority to pass said resolution or to bind the town of Elgin or to waive the issue of stock of said town save and except as above stated; that no proceedings except as herein set forth were ever taken by the electors of said town or any proceedings or acts whatever to authorize the passage of said resolution except as herein stated; that said Plainview Railroad Company constructed its railroad and had its cars running thereon and performed the several acts on its part as in said proposition stated, except that the railroad company never issued to the

town of Elgin any stock of the said company and never tendered or offered to issue the same.

That after the foregoing petitions and proceedings and on or about the first day of November, A. D. 1878, and before the issue, making, or delivering of the bonds or coupons herein set forth and described an action was duly begun and instituted in the district court of said State of Minnesota in and for the county of Wabasha, in said State of Minnesota, being the proper court of original jurisdiction therein, in which action one George Harrington, a resident citizen and taxpayer of the town of Plainview, a municipal and incorporated township under the laws of said State, situate in Wabasha county Minnesota, was plaintiff and the Supervisors of said Town of Plainview, the Chairman of the Board of Supervisors thereof, and the Town Clerk of said Town, the Town of Plainview, and the said Plainview Railroad Company were defendants; that said suit was brought to have the town officers of said town of Plainview perpetually enjoined from issuing and said Plainview Railroad Company from receiving or obtaining any bonds and coupons of said town of Plainview, which bonds and coupons proposed to be issued by said town of Plainview were exactly similar to the bonds and coupons hereafter set forth, and the proceedings, petitions, and the steps taken to authorize the issue of said bonds were the same as in the complaint in this action set out, all said steps, proceedings, and petitions taken in said town of Plainview having been under and pursuant to section 7, chapter 106, General Laws of said State for the year
176 1877, and the ground on which a perpetual injunction in said suit was asked was because said section 7, chapter 106, of the General Laws of 1877 was unconstitutional and void and said proceedings thereunder wholly invalid; which said matters were fully set forth in the complaint in said action, and the defendants answered said complaint.

That said court had and duly obtained jurisdiction of all the parties to said action and of the subject-matter thereof, and that on the 11th day of November, A. D. 1878, it granted a preliminary injunction in said suit, commanding and enjoining said supervisors and said defendants to desist from issuing or delivering to the Plainview Railroad Company or to any one for it any bonds of said town of Plainview and enjoining said Plainview Railroad Company from receiving the same, which injunction was then duly served upon all of said defendants; that said action was brought on for trial before the district court, in chambers, at Winona, on the 27th day of January, A. D. 1879, and on the 6th day of February, A. D. 1879, said court made and filed its decision therein, by which it found and decided that the plaintiff in said action was not entitled to the relief asked for, and that the defendants were entitled to judgment dismissing the action; that on the 8th day of February, 1879, an order was made, on the application of the plaintiff's attorney in said action, staying proceedings therein, as follows (after the title of the action):

"On application of the plaintiff herein it is hereby ordered that all proceedings herein upon or pursuant to the findings and decision

of the court rendered herein be, and the same are hereby, stayed for the period of twenty (20) days from this date, that plaintiff may prepare a case on bill of exceptions herein.

"Dated February 8th, 1879."

WILLIAM MITCHELL,
Judge of the District Court.

And on February 26th, 1879, a further stay of fifteen days was granted.

That on the 11th day of March, 1879, the court made an order denying a new trial, said motion having been made upon the ground that the decision of the court is contrary to law; and on the same day a bond for appeal was given by said Harrington in said action in due form, with two sureties, in the sum of $300, reciting that said Harrington had appealed to the supreme court of the State of Minnesota from said order, and conditioned to be void if said Harrington should well and truly pay all costs and charges which might be awarded against him on such appeal, not exceeding the penalty of said bond; and on the 12th day of May, 1879, said Harrington gave due notice of appeal to said supreme court from said order,
177 and on March 15th, 1879, said district court rendered a judgment that said plaintiff's action be dismissed upon the merits and the preliminary injunction dissolved.

That on the 12th day of September, 1879, the plaintiff in said action gave due notice of appeal to said supreme court from the aforesaid judgment, and duly gave a bond for costs on such appeal in the sum of $250, as provided by law; that all proceedings requisite to appeal to said supreme court from said order and judgment were duly taken by said Harrington, and transcripts of the records in said case were by him duly filed in said supreme court and said supreme court duly had and obtained jurisdiction in said premises; that the same was duly heard and determined by said supreme court, and said supreme court did, on or about the 6th day of October, A. D. 1880, duly determine, adjudge, and decree that said section seven of the aforesaid act of 1877 was and is unconstitutional and void, and that all of said proceedings are and were invalid, and that neither said town officers or said town of Plainview has or had any power or authority to issue said bonds or coupons or any of them or said Plainview Railroad Company to receive them, and reversed the aforesaid judgment of said district court and duly entered and recorded its judgment of reversal to that effect, which judgment of said supreme court has ever since remained and now is of full force and effect.

That on the 16th day of November, A. D. 1878, the said board of supervisors of the said town of Elgin, at the instance and request of said railroad company, passed and placed on file in the office of the town clerk of said town of Elgin a certain resolution, a true copy of which is annexed to the complaint herein and marked Exhibit "D;" that no authority had ever been given by the electors of said town or by said town or by any proceedings or act to authorize said supervisors to pass such resolution, except as stated in these findings; that

said supervisors and said railroad company well knew when the same was passed and when all the other proceedings were taken herein that no election had ever been held in the premises; that, pending said action brought by said Harrington and on the 16th day of November, 1878, said D. F. Ferguson, chairman of said board of supervisors, and B. H. Gould, said town clerk of said town, pretending to act under and by virtue of the foregoing proceedings according to the resolution and said section seven of said act of 1877, and without any other authority, executed, issued, and delivered to the Plainview Railroad Company certain negotiable bonds and interest coupons thereto attached, which said bonds were eighty in number,
178 purporting to be bonds of the said town of Elgin, and were numbered from one to eighty, consecutively, and each of the same on its face purported to be the bond of the town of Elgin; that all of the same were payable to the Plainview Railroad Company or to bearer and were for $500 each, amounting in the whole to the sum of forty thousand dollars ($40,000); that all of the said bonds were of the same tenor, and that a copy of one of them is annexed to the complaint and marked Exhibit "E;" that said bonds were dated January 1st, 1879, and were payable in twenty years after the date thereof, and bear interest at seven per cent. per annum, payable annually, according to the conditions of twenty certain interest coupons attached to each of said bonds and numbered corresponding to the number of said bond, the first being payable January 1st, 1880, and the others payable on January the first of each year thereafter for twenty years, and that a copy of one of said coupons, which are all of the same tenor except as to the number and date when payable, is attached to the complaint herein and marked Exhibit "F," and all of which were signed by said Ferguson and Gould as such officers, were attached to said bonds, and were delivered to said Plainview Railroad Company therewith; that said officers had not been authorized by said town or by any vote of the electors or legal voters thereof or by any of the laws of the State of Minnesota to issue said bonds or coupons or by any act or proceedings whatever, except the acts and proceedings herein set forth, all of which they well knew at said time, and that said bonds and coupons were executed and delivered by said town to said railroad company without any consideration whatever, and that said railroad company received the same well knowing all the premises herein set forth.

That said Plainview Railroad Company, well knowing all the premises and intending to deprive said town of any defence to said bonds and coupons as against any *bona fide* holders for value thereof, did, in the fore part of July, A. D. 1879, sell and transfer and deliver all of said bonds and coupons to the Chicago & Northwestern Railway Company, a corporation created and existing by laws of the State of Wisconsin and the State of Illinois, for the sum of $40,000, which sum had been previously advanced by said Chicago & Northwestern Railway Company to said Plainview Railroad Company for the construction of the railroad of the said latter company; that thereafter, and on or about July the 10th, A. D. 1879, said Chicago

& Northwestern Railway Company sold and delivered all of said bonds and coupons to one T. Thomas, of Baraboo, Wisconsin,
179 a citizen of that State, for the sum of eighty (80) per cent. of the par thereof; that immediately thereafter, and in the month of July, 1879, said Thomas sold and delivered said bonds to Samuel Marshall and Charles F. Illsley, of Milwaukee, in the State of Wisconsin, and citizens of said State, for the sum of eighty-seven (87) per cent. of the par thereof; that in making said sale to Marshall & Illsley said Thomas sold and delivered to them and they paid him for all of said bonds, but said Thomas reserved the right to take back from them a few thousand dollars, about $3,000, which he shortly afterwards did, and sold a part of the amount which he so took back to the trustee of some minor heirs, to wit, to one Charles H. Williams, of Cincinnati, Ohio, and the rest of the bonds which he so took back he sold, some to the said Marshall & Illsley and some to one Fitch, of the National Exchange Bank of Milwaukee.

That said Chicago & Northwestern Railway Company and said Thomas had due notice and knowledge of all the facts and circumstances preceding and attending the delivery of said bonds except as to the pendency of the proceedings of the suit so as aforesaid brought by said Harrington, and that Marshall & Illsley and said Williams and said Fitch had no knowledge when they purchased said bonds of any of the said proceedings nor of the existence or pendency of said suit, but bought and paid for said bonds without such knowledge or notice and without any knowledge or notice of any defence thereto, except as such appears upon the face of said bonds, and became and were thereby *bona fide* purchasers and holders for value thereof.

That thereafter, and on or about the 29th day of January, A. D. 1881, said town having refused to pay the interest coupons then due, said Marshall & Illsley, who were citizens of the State of Wisconsin, commenced an action in the circuit court of the United States for the district of Minnesota against the town of Elgin, and said court then and there obtained jurisdiction of the said action and of the parties thereto; that said suit was brought to recover the amount of interest due upon forty-five coupons of said bonds falling due January 1st, 1881, and was brought upon said forty-five coupons; that said Marshall & Illsley in their complaint in said action alleged that they were the owners of all of said bonds and coupons annexed, except the coupons which matured January 1st, 1880, said bonds being forty-five in number, and that a copy of one of said bonds and of all the coupons sued on was attached to said complaint; that the town of Elgin in said suit defended said action by answer, denying that said bonds or any of them were ever made, executed, or delivered by the defendant or by its authority, or that the chairman of its board of supervisors or its
180 town clerk was ever lawfully authorized or empowered to make, execute, or deliver the same. Said answer alleged that each and all of said bonds and coupons were made, executed, and delivered by said chairman and said clerk under and pursuant to the pretended authority and provisions of section seven, chapter 106

of the General Laws of the State of Minnesota for the year A. D. 1877 as aforesaid, and in no other manner and by no other authority whatever. Said answer also set up the proceedings prior to and attending the issue of said bonds had by said town, its officers, and the Plainview Railroad Company in relation thereto substantially as set up in the complaint in this case, and had attached thereto copies of the notice, proposition, and petition set up in the complaint in this action.

That the proceedings in the said Harrington case were before the United States circuit court in said action and were by it considered; that said Marshall & Illsley to the said answer of the defendant alleged in reply that they purchased the bonds and coupons in question on the 8th of July, 1879, for a valuable consideration and without any notice in fact of any of the matters relied on in defence of said action except such as appears on the face of said bonds from the recitals therein contained. They also set up in their said reply that about three months after they so purchased said bonds and coupons, and not before, they obtained information that section 7 of the statute mentioned in said answer had been decided unconstitutional and void by the supreme court of the State of Minnesota in the case of G. W. Harrington against The Plainview Railroad Company and others, reported in volume 6 of The Northwestern Reporter, pages 777 to 781, inclusive, to which decision the plaintiffs in their reply referred for greater certainty as to the matters decided therein and thereby.

That said suit brought by said Marshall & Illsley duly came on for trial before said United States circuit court at the June, 1881, term thereof, and on the 11th day of October, 1881, the said court, a jury trial having been waived, found as facts in said action that the bonds and coupons involved in such action were purchased by the said Marshall & Illsley July 9th, 1879, for value and without notice of any of the matters relied on as defence except such as appear on the face of said bonds; that the amount due on said bonds and coupons sued on in said action was $1,660.75, and did adjudge and enter its judgment that said Marshall & Illsley do have and recover against said town of Elgin said sum, and also the sum of $36.10 costs and disbursements—in all $1,696.85—and have
181 execution therefor, and did adjudge that in the hands of Marshall & Illsley, such innocent purchasers, said bonds and coupons are valid and enforceable obligations against said town of Elgin. It is further found as facts that said town of Elgin did, before the commencement of this action and on or about the 17th day of March, A. D. 1883, pay said judgment in full; that said town of Elgin removed said judgment of the United States — court to the Supreme Court of the United States by writ of error, but that said court last named dismissed the same, before this present action was brought, on the ground that the amount in controversy upon the face of such record was less than $5,000, and that after the institution of their first suit in said United States circuit court said Marshall & Illsley duly brought in said court which, then and there had and obtained jurisdiction thereof and of the parties, four

other suits against the said town of Elgin to recover upon certain other coupons of said bonds held and owned by them and the interest falling due, which said coupons had become due year by year according to the terms thereof, to wit: One suit which was commenced November 1st, 1881; another suit which was commenced February 27th, 1882; another suit which was commenced May 11th, 1883, and another suit which was commenced January 5th, 1884; and that on the two suits brought November 1st, 1881, and February 27th, 1882, the town of Elgin interposed substantially the same answer as to the first suit brought against it, but to the other suits it made no answer, for the reason it was advised that the question of its liability as to a *bona fide* holder of said bonds and coupons had become *res adjudicata* in that court; that said United States circuit court so proceeded in said actions and in each of them that judgment was rendered in each of said cases in favor of Marshall & Illsley and against the town of Elgin, as follows: In the action commenced November 1st, 1881, for $1,443; in the action commenced February 27th, 1882, for $2,852.85; in the action commenced May 11th, 1883, for $2,745.12, and in the action commenced January 5th, 1884, for $3,175.82; that of such judgments so rendered said town of Elgin has paid as follows: On March 17th, 1883, it paid on said judgment of October the 11th, 1881, $1,696.85; on June 30th, 1883, it paid on the judgment of January 10th, 1883, $2,853.05; on January 30th, 1883, it paid on the judgment of June 10th, 1883, $1,443.91, and that it had prior to the commencement of this present action paid all the said judgments except those rendered in the two suits last commenced, which said two last judgments it will be compelled to pay.

That prior to the commencement of this present action
182 said Marshall & Illsley sold and transferred to various persons who were *bona fide* purchasers for value thereof without out notice or knowledge of any of the matters which are claimed to invalidate said bonds and coupons ever held by them, except $3,000 thereof and except such coupons as they had obtained judgments upon, and that said bonds and coupons are now held and owned by such *bona fide* purchasers or their assigns, and are and will be in the hands of such transferees or their assigns valid and subsisting obligations against this plaintiff, which the plaintiff will be compelled to pay in full, principal and interest.

That in the year 1881 the State of Minnesota duly enacted a certain statute entitled "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railway Company," which act is as follows(after the title):

"Be it enacted by the Legislature of the State of Minnesota.

SECTION 1. The Winona & Saint Peter Railroad Company is hereby authorized to purchase the stock or to purchase or lease the property and franchises of the Plainview Railway Company, and said last-named company — hereby authorized to sell and convey or to lease its property and franchises to the said first-named com-

pany upon such terms as may be agreed upon by the respective boards of directors of said companies, so as to make the property and franchises of the last-named company a part of the property and franchises of said Winona and Saint Peter Railroad Company to be used and operated by it under its charter:

Provided, That any such purchase of the property or franchises of the Plainview Railway Company shall be made and all such property held by said Winona and Saint Peter Railroad Company subject to all demands, claims, and rights of action against said Plainview Railway Company arising or growing out of the latter company having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin, and Viola to said Plainview Railway Company, and in taking such transfer under this act said purchasing company shall assume all claims and demands against said Plainview Railway Company to the extent and value only of the property and franchises so transferred.

SEC. 2. The Winona & Saint Peter Railroad Company is hereby authorized to issue its capital stock to an amount necessary to make and complete the purchase aforesaid.

183 SEC. 3. This act shall take effect and be in force from and after its passage. Approved March 3, 1881."

Which act after its passage was duly accepted and consented to by the Winona & St. Peter Railroad Company.

That the bonds and coupons in this action in question are the same bonds and coupons intended by said statute, and that the matters and facts recited in said statute are true; that on the 11th day of May, 1881, said Winona & St. Peter Railway Company, acting solely under the provisions of said statute, purchased all the property and franchises of the Plainview Railway Company referred to in said statute and took a transfer and deed thereof from said Plainview Railroad Company, and I find as a fact that it has been stipulated in this action and in a similar action brought by the town of Plainview and tried with this action that no issue shall be raised as to the value of the property and franchises of the Plainview Railroad Company so transferred to the Winona & St. Peter Railroad Company, but that if the plaintiff in this suit recovers a judgment against the defendant no question shall be made by the defendant, but that the property conveyed and deeded to the defendant by the said Plainview Railroad Company was and is equal in value to the judgment so obtained, and that for the purposes of this action the value of said property was equal to the judgment obtained in this action, and I find as a fact that the value of such property and franchises so transferred by the Plainview Railroad Company to the Winona & St. Peter Railroad Company was at the time of such transfer in fact the sum of two hundred and twenty-five thousand dollars ($225,000).

That as part and parcel of such sale and transfer and to evidence the carrying out of the same said Plainview Railway Company did, on the 11th day of May, A. D. 1881, execute to the Winona & St.

Peter Railroad Company its deed of conveyance and transfer, of which a true copy is as follows, and which deed was duly recorded in the county of Olmsted, in the State of Minnesota (through which county said Winona & St. Peter Railroad Company operates its line of railroad), on the 6th day of April, A. D. 1885, in Book 53 of Deeds, page 403, and through which county a part of the line of the said Plainview Railroad Company runs:

Plainview Railroad Company to Winona & St. Peter Railroad Company.

184 This indenture, made this eleventh day of May, A. D. 1881, by and between the Plainview Railroad Company, a corporation of the State of Minnesota, party of the first part, and the Winona & St. Peter Railroad Company, a corporation of said State, party of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of two hundred and twenty-five thousand dollars ($225,000) to it paid by said party of the second part, the receipt of which is hereby acknowledged, and by virtue of the power and authority conferred upon the parties hereto by an act of the Legislature of the said State entitled "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railway Company," approved March 3d, 1881, and with the unanimous consent of the stockholders of both parties hereto, hath granted, bargained, sold, transferred, and conveyed, and by these presents doth grant, bargain, sell, transfer, and convey, to said party of the second part and to its successors forever all and singular the railroad of said party of the first part, beginning at a point within the corporate limits of the village of Plainview, in the county of Wabasha, in the State of Minnesota, to a junction with the railroad of the Winona & St. Peter Railroad Company, in the county of Olmsted, in the State of Minnesota, a distance of about sixteen miles, more or less, with all and singular the franchises, including the franchise to be a corporation, and all rails and switches, turnouts, warehouses, station buildings, elevators, water-tanks, turntables, side track, tools, ties, embankments, superstructure, and all property of every kind and description, real, personal, or mixed, and all choses in action, moneys, debts, claims, or demands of every kind belonging to said party of the first part or in any manner appurtenant to the said railroad or any part thereof, hereby conveying all the effects and property of said party of the first part, wherever situate or being, so that said party of the second part may and shall own, possess, and enjoy the same to the same extent that the same were owned, possessed, and enjoyed by said party of the first part before the execution hereof:

To have and to hold the same and every part and parcel thereof to the said party of the second part and its successors forever.

In witness whereof the said party of the first part has caused these presents to be signed by its president, sealed with its corporate

seal, and the same attested by its secretary the day and year first above written.

[Official Seal Plainview Railroad Company.]

PLAINVIEW RAILROAD COMPANY,
By ALBERT KEEP, *President.*
Attest: J. B. REDFIELD, *Secretary.*

185 Signed, sealed, and delivered in presence of—
WILLIAM A. ALLEN,
M. M. KIRKMAN.

STATE OF MINNESOTA, } ss:
Winona County, }

Be it remembered that on this 11th day of May, A. D. eighteen hundred and eighty-one, before me, the subscriber, a notary public in and for said Winona county, in the State of Minnesota, personally appeared Albert Keep, known to me to be the president of the Plainview Railroad Company, and Joseph B. Redfield, to me known to be the secretary of the said railroad company, who, as such president and secretary, executed the foregoing instrument, and they severally acknowledged to me that they executed the foregoing instrument as president and secretary of said railroad company, and caused the corporate seal of the said company to be affixed thereto, pursuant to authority given by the board of directors of said company, as the free act and deed of the said Plainview Railroad Company for the purposes therein specified.

Witness my hand and official seal the day and year aforesaid.

[Notarial Seal Winona County, Minn.]

W. A. ALLEN,
Notary Public, Winona County, Minn.

That immediately upon the execution of such deed the Winona & St. Peter Railroad Company took possession of all the property and franchises conveyed and transferred or intended to be conveyed and transferred to it by said deed and has ever since owned, used, and enjoyed the same; that said purchase was made and deed so executed and received under and by virtue of the said statute last named and the powers therein granted, and that the Winona & St. Peter Railroad Company, in making such purchase and taking such deed and transfer and as a part of the consideration therefor, assumed all claims, demands, and rights of action against the Plainview Railroad Company as in said act provided, and particularly assumed and became liable for all claims, demands, or rights of action set forth in the complaint in this action, and agreed to pay the same.

That, save as aforesaid, the allegations in the pleadings not admitted therein are not established by the evidence, and are therefore found not to be true. It is found as conclusions of law that the plaintiff is entitled to have and recover of the defendant the sum of forty thousand dollars ($40,000) and interest thereon from the first

day of January, A. D. 1879, at seven (7) per cent. per annum, amounting at this date to fifty-nine thousand five hundred and sixty-one and five-hundredths dollars ($59,561.05), together with the costs and disbursements of this action.

186 In case entry of judgment is delayed after this date there will be added to the above amount interest on the sum of forty thousand dollars ($40,000) from this date. Let judgment be entered accordingly.

Dated this 26th day of December, A. D. 1885.

By the court:

L. W. COLLINS,
District Judge.

187 The above "case" having been by me examined and found true and conformable to the facts, I do hereby settle, approve, and sign and seal the same.

Dated May 19th, 1886.

L. W. COLLINS, [SEAL.]
District Judge.

Notice of Motion for New Trial. Filed Aug. 9, 1886. *Chas. J. Stauff, Clerk.*

District Court, Wabasha County, State of Minnesota.

TOWN OF ELGIN *vs.* THE WINONA & ST. PETER RAILROAD CO.

SIRS: You will please take notice that on the pleadings and decision and on the settled case and all the records and files in this action the defendant will make a motion herein at a special term of the district court to be held at the court-house, in the city of St. Cloud, before the Honorable L. W. Collins, judge of said court, on the 24th day of April, A. D. 1886, at 10 o'clock in the forenoon of such day or as soon thereafter as counsel can be heard, that the decision and findings herein be vacated and set aside and a new trial granted for the following causes materially affecting the substantial rights of the defendant, viz:

First. That the findings of fact are not justified by the evidence, and that the decision of the court upon the facts is contrary to law and to the evidence.

Second. For errors in law occurring at the trial and duly excepted to by the defendant.

Third. Because of the refusal of the court to make his findings more specific or to find on certain allegations of the answer.

THOMAS WILSON,
Defendant's Attorney.

To Hon. C. K. Davis and Kellogg and Eaton, plaintiff's attorneys.

Endorsed: District court, Wabasha county. The Town of Elgin *vs.* The W. & St. P. R. R. Co. Notice of trial. Filed May 22, 1886. Chas. J. Stauff, clerk.

Order Denying New Trial.

STATE OF MINNESOTA, *County of Wabasha:*

THE TOWN OF ELGIN *vs.* THE W. & ST. PETER R. R. CO.

The motion by the defendant for a new trial in the above-entitled action having been duly argued & submitted, it is hereby ordered that said motion be, and it is hereby, denied.

Dated May 19th, 1886.

By the court:

L. W. COLLINS, *Judge.*

Filed May 22, 1886.

CHAS. J. STAUFF, *Clerk.*

188 STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD COMPANY, Defendant.

You will please take notice that the defendant appeals to the supreme court of the State of Minnesota from the order of this court in this action entered on the 22nd day of May, 1886, denying defendant's motion for a new trial of the above-entitled action.

Dated May 27th, 1886.

WILSON & BOWERS,
Attorneys for Defendant.

To C. K. Davis & Kellogg & Eaton, attorneys for plaintiff, and Charles J. Stauff, clerk of the district court.

Endorsed: District court, county of Wabasha. The Town of Elgin ag'st The W. & St. P. R. R. Co. Notice of appeal to supreme court. Due service of the within notice hereby admitted at Rochester, Minnesota, on this 3rd day of June, A. D. 1886. Kellogg & Eaton and C. K. Davis, att'ys for pl'ff. Due service of the within notice admitted at Wabasha, Minn., on this 8th day of June, 1886. Chas. J. Stauff, clerk district court. Wilson & Bowers, def't's att'ys. Filed June 8, 1886. Chas. J. Stauff, clerk.

189 *Mandate.*

STATE OF MINNESOTA, *ss:*

Supreme Court.

The State of Minnesota to the honorable judge and officers of the district court of the third judicial district, sitting within and for the county of Wabasha, Greeting:

Whereas lately in your court, in an action therein pending,

wherein The Town of Elgin was plaintiff and The Winona & St. Peter Railroad Company was defendant, a certain order was entered therein May 22d, 1886, from which order said defendant appealed to this court; and whereas the same was duly argued, heard, and submitted at the general October term, A. D. 1886, of our supreme court:

After mature deliberation thereupon had, our supreme court did adjudge, determine, decree, and order "That the order of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the plaintiff and respondent above named have judgment accordingly.

A copy of the entry of judgment thereupon in this court is herewith transmitted and made part of this remittitur.

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court in said hereinbefore-mentioned cause, and the same is hereby and herewith remanded to your court for such other or further record and proceedings therein as may be by law necessary, just, and proper under and by virtue of the said order herein made.

Witness the Hon. James Gilfillan, chief justice of the supreme court aforesaid, and the seal of the said court, at St. Paul, this 25th day of July, A. D. 1887.

[Supreme Court Seal.]

J. D. JONES,
Clerk of the Supreme Court.

Endorsed: Supreme court, State of Minnesota. Mandate
190 To the district court of Wabasha county. The Town of Elgin, resp'd't, against The Winona and St. Peter Railroad Company, app'l't. C. K. Davis, Kellogg & Eaton, C. W. Brown, att'ys for resp'ts. Filed July 27, 1887. Charles J. Stauff, clerk.

191 STATE OF MINNESOTA, *County of Wabasha:*

District Court, 3rd Judicial District.

THE TOWN OF ELGIN, Plaintiff,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

This action, being on the calendar for trial at the general term of said court, A. D. 1885, and being reached in its order, was tried by the court on the 25th day of January, A. D. 1885, the Hon. L. W. Collins, district judge, presiding, a jury having been duly waived by stipulation of the parties to said action, and the court having heard the evidence and duly considered the same and having made and filed its findings of fact and conclusions of law, wherein it found as conclusions of law that the plaintiff is entitled to have and recover of the defendants the sum of forty thousand dollars ($40,000) and interest thereon from the first day of January, A. D. 1879, at seven per cent. per annum, amounting at this date to fifty-nine thousand five hundred and sixty-one and $\frac{5}{100}$ dollars ($59,561.05),

together with the costs and disbursements of this action. In case of judgment is delayed after this date there will be added to the above amount interest on the sum of forty thousand dollars ($40,000) from this date. Let judgment be entered accordingly.

Dated this 26th day of December, A. D. 1885.

And the defendant having made a motion for a new trial, and the said motion having been by said court denied, and the said defendant having appealed to the supreme court of the State of Minnesota from the order denying said motion for a new trial, and the said supreme court having by its judgment affirmed the order of said district court denying such motion for a new trial, and a duly certified transcript of the said judgment of the supreme court and the mandate of the said supreme court having been duly transmitted to and filed in the said district court:

Now, therefore, on motion of C. K. Davis and Kellogg & Eaton, it is by the said district court now here considered, ordered, and adjudged that the said plaintiff, The Town of Elgin, do have and recover of the said defendant, The Winona & St. Peter Railroad Company, the sum of sixty-four thousand twenty-five and $\frac{49}{100}$
192 dollars damages and also the sum of two hundred twenty and $\frac{28}{100}$ dollars costs and disbursements, in all amounting to the sum of sixty-four thousand two hundred forty-five and $\frac{77}{100}$ dollars ($64,245.77).

Dated this 30th day of July, A. D. 1887.

By the court:

[District Court Seal.]

CHAS. J. STAUFF, *Clerk.*

Endorsed: District court, Wabasha county. Town of Elgin ag'st The Winona & St. Peter Railroad Company. Judgment-roll, 1887. Recorded in Judgment Record B, page 390, and docketed in Judgment Docket A, page 300, this 1st day of August, A. D. 1887. Chas. J. Stauff, clerk. Davis, Kellogg & Eaton, pl'ff's att'ys.

193 STATE OF MINNESOTA, *County of Wabasha:*

District Court, 3rd Judicial District.

TOWN OF ELGIN, Plaintiff,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

SIRS: Take notice that the defendant in the above-entitled action, The Winona and St. Peter Railroad Company, hereby appeals to the supreme court of the State of Minnesota from the judgment of the said above-named district court, entered herein on the 30th day of July, A. D. 1887, in favor of plaintiff and against the defendant; and take notice, further, that the appeal hereby taken is from the whole and every part of said judgment, and that upon said appeal said appellant, The Winona and St. Peter Railroad Company, will bring up for review the order made in the above-entitled action by

the district court aforesaid, dated April 24th, 1886, denying the motion made by the defendant in the above-entitled action that further and additional findings be made and filed therein by said district court, and that the findings of said district court be amended and made more full and specific.

Dated August 6th, 1887.

WILSON AND BOWERS,
Attorneys for Defendant, The Winona and St. Peter Railroad Company.

To Charles J. Stauff, Esq., clerk of the district court in and for Wabasha county, Minn.; C. K. Davis, Esq., and Kellogg & Eaton, Esq'r's, plaintiff's attorneys.

Endorsed: District court, Wabasha county. Town of Elgin, plaintiff, ag'st W. & St. P. R. R. Co., defendant. Notice of appeal. Due service of the within and of a copy of the bond on said
194 appeal is hereby admitted on this 15th day of August, 1887. Kellogg & Eaton and C. K. Davis, attorneys for pl'ff. Filed Aug. 17th, 1887. Chas. J. Stauff, clerk. Due service upon me of the within notice of appeal is hereby admitted this 17th day of August, 1887. Chas. J. Stauff, clerk.

District Court, Wabasha County.

TOWN OF ELGIN, Plaintiff,
against
WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

Know all men by these presents that we, The Winona and St. Peter Railroad Company, a corporation created by and existing under the laws of the State of Minnesota, as principal, and Albert Keep, of Chicago, Illinois; Marvin Hughitt, of Chicago, Illinois; Henry W. Lamberton, of Winona, Minnesota, and Matthew G. Norton, of Winona, Minnesota, as sureties, are held and firmly bound unto The Town of Elgin, plaintiff in the above-entitled action, in the sum of sixty-four thousand and three hundred (64,300) dollars, lawful money of the United States, to be paid unto the said Town of Elgin, its successors or assigns; for which payment, well and truly to be made, we jointly and severally bind ourselves, our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of August, A. D. 1887.

The condition of this obligation is such that whereas the said The Winona and St. Peter Railroad has appealed to the supreme court of the State of Minnesota from the judgment of the said district court for Wabasha county, entered in the above-entitled action on the 30th day of July, A. D. 1887, in favor of the plaintiff, The Town of Elgin, and against the defendant, The Winona and St. Peter
195 Railroad Company: Now, therefore, if said appellant pay all costs and charges which may be awarded against it on the said appeal, not exceeding the penalty of this bond, and if, in case

the said judgment appealed from or any part thereof is affirmed, the said appellant pay the amount directed to be paid by the said judgment or the part of such amount as to which the judgment is affirmed only in part and all damages which are awarded against the appellant upon the said appeal, not exceeding the penalty of this bond, then this obligation to be void; otherwise to remain in full force.

In testimony whereof the said The Winona and St. Peter Railroad Company has caused its corporate seal to be hereto attached and these presents to be subscribed in its behalf by its president, and the said sureties have hereunto set their respective hands and seals this 4th day of August, A. D. 1887.

WINONA AND ST. PETER R. R. CO.,
By MARVIN HUGHITT, *President.*
ALBERT KEEP. [SEAL.]
MARVIN HUGHITT. [SEAL.]
HENRY W. LAMBERTON. [SEAL.]
MATHEW G. NORTON. [SEAL.]

Signed, sealed, and delivered in presence of—
[W. & St. P. R. R. Co.'s Seal.]
Attest: J. B. REDFIELD, *Secretary.*

STATE OF ILLINOIS, } ss:
County of Cook, }

On this 4th day of August, 1887, before me personally appeared Marvin Hughitt, to me personally known, who, being by me duly sworn, did say that he is president of the Winona and St. Peter Railroad Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Marvin Hughitt acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] J. L. McKITTRICK,
Notary Public, Cook Co., Illinois.

196 STATE OF ILLINOIS, } ss:
County of Cook, }

On this 4th day of August, 1887, before me personally appeared Albert Kee- and Marvin Hughitt, to me personally known to be the persons described in and who executed the foregoing instruments and they acknowledged that they executed the same as their free act and deed and as the free act and deed of each of them.

[NOTARIAL SEAL.] J. L. McKITTRICK,
Notary Public, Cook County Illinois.

STATE OF MINNESOTA, } ss:
County of Winona, }

On this 9th day of August, 1887, before me personally appeared

Henry W. Lamberton and Mathew G. Norton, to me personally known to be the persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed and as the free act and deed of each of them.

[NOTARIAL SEAL.] B. F. HEUSTON,
Notary Public, Winona County, Minnesota.

STATE OF ILLINOIS, } ss:
County of Cook, }

Albert Keep and Marvin Hughitt, having each been duly sworn, say, each for himself, that he is one of the sureties in the foregoing bond; that he is a resident of Chicago, in the State *in* Illinois, and worth twice the amount of the penalty of the foregoing bond above his debts and liabilities and exclusive of his property exempt from execution.

ALBERT KEEP.
MARVIN HUGHITT.

Subscribed and sworn to before me this 4th day of August, 1887.
[NOTARIAL SEAL.] J. L. McKITTRICK,
Notary Public, Cook Co., Ill.

197 STATE OF MINNESOTA, } ss:
County of Winona, }

Henry W. Lamberton and Mathew G. Norton, having each been duly sworn, say, each for himself, that he is one of the sureties in the foregoing bond; that he is a resident and freeholder of the State of Minnesota and worth twice the amount of the penalty of the foregoing bond above his debts and liabilities and exclusive of his property exempt from execution.

HENRY W. LAMBERTON.
MATHEW G. NORTON.

Subscribed and sworn to before me this 9th day of August, 1887
[NOTARIAL SEAL.] B. F. HEUSTON, JR.,
Notary Public, Winona County, Minnesota.

Endorsed: State of Minnesota, county of Wabasha. In district court. Town of Elgin, plaintiff, ag'st W. & St. P. R. R. Co., defendant. Appeal bond. Wilson & Bowers, att'ys for def't, Winona, Minn. I hereby approve the within bond. Dated Aug. 12, 1887. Chas. M. Start, judge of said court. Filed Aug. 15th, 1887. Chas. J. Stauff, clerk.

198 STATE OF MINNESOTA, } ss:
County of Wabasha, }

District Court, Third Judicial District.

I, Chas. J. Stauff, clerk of district court in and for Wabasha

county and State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original summons, complaint, stipulation for amended complaint, answer, reply, case, notice of motion for a new trial, order denying motion, notice of appeal, mandate of supreme court, judgment and notice, and bond on appeal in the action therein entitled now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Wabasha, this 4th day of November, A. D. 1887.

[Seal District Court, Wabasha County, Minn.]

CHAS. J. STAUFF,
Clerk District Court, Wabasha County, Minn.

And afterwards the following further proceedings were had in said cause in the supreme court of the State of Minnesota, to wit:

199 *Note of Issue.*

Supreme Court.

TOWN OF ELGIN, Pl'ff & Respondent,
against
WINONA & ST. PETER RAILROAD COMPANY, Def't & Appellant. } 5163.

Notice of appeal, dated Aug. 13th, 1887.
Kellogg & Eaton & C. K. Davis, attorneys for plaintiff.
Wilson & Bowers, attorneys for defendant.

Will the clerk please file this note of issue and enter the cause on the calendar for the April, A. D. 1888, term of this court.

Yours, &c., WILSON & BOWERS,
Attorneys for Def't & App't.

[Endorsed:] Filed March 22, 1888. J. D. Jones, clerk.

200 STATE OF MINNESOTA:

In Supreme Court.

TOWN OF ELGIN, Respondent,
vs.
WINONA & ST. PETER RAILROAD COMPANY, Appellant.

To Wilson & Bowers, attorneys for appellant:

You will take notice that upon the record in this case, which is on file in the supreme court, and upon your assignment of errors, points, and authorities heretofore served, the undersigned will move the court upon the opening of the next session thereof, on Tuesday, the 3rd day of April, 1888, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the capitol, in St. Paul,

for an order dismissing said appeal or affirming the judgment of the court below. The grounds of said motion are that upon an appeal in this cause from an order denying the motion for a new trial therein at the October term of this court, 1886, all the questions now sought to be raised and argued by the assignment of errors, points, and authorities heretofore served were either raised by counsel and duly considered by this court on said former appeal or might have been assigned as error by counsel on said former appeal, and that all questions which were either raised or decided or which might have been raised or decided on said former appeal are "*res adjudicata*" and cannot be raised or discussed or considered upon this appeal.

Dated March 22, 1888.

DAVIS, KELLOGG & SEVERANCE &
BURT W. EATON,
Attorneys for Respondent.

C. W. BUNN, *Of Counsel.*

201 [Endorsed:] 5162. State of Minnesota. In supreme court. Town of Elgin *vs.* The Winona & St. Peter Railroad Company. Notice of motion to dismiss appeal. Service of the within notice of motion admitted this 23d day of March, 1888. Wilson & Bowers, appellant'- att'ys. Filed April 19, 1888. J. D. Jones, clerk.

202 *Affidavit of Disbursements on Trial and Notice of Taxation of Costs.*

STATE OF MINNESOTA:

Supreme Court.

THE TOWN OF ELGIN
against
THE WINONA AND ST. PETER RAILROAD COMPANY.

Costs and disbursements:

Statute costs (att'ys' fees)	$25 00
Disbursements:	
Clerk's fees	9 50
Printing pl'ff's brief	5 00
	$39 50

Costs and disbursements taxed and allowed at $39.50 in favor of respondent.

May 9th, 1888.

J. D. JONES, *Clerk.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Frank B. Kellogg, being duly sworn, says that he is one of the pl'ff's attorneys in the above-entitled action; that the foregoing bill

and items of disbursements therein are just and correct, and have been necessarily paid or incurred therein.

FRANK B. KELLOGG.

Subscribed and sworn to before me on this 3d day of April, 1888.

[NOTARIAL SEAL.] C. W. L. WITHER,
Notary Public, Ramsey Co., Minn.

To Wilson & Bowers, attorneys for defendant & appellant, Winona, Minn.

DEAR SIRS: Please to take notice that on the 4th day of May, A. D. 1888, at 9½ o'clock a. m., application will be made to J. D. Jones, Esq, clerk of said court, at his office, in the capitol, in the city of St. Paul, Minn., to have the foregoing items of costs and disbursements taxed and inserted in the judgment to be entered herein.

Yours respectfully,

DAVIS, KELLOGG & SEVERANCE,
Attorneys for Pl'ff & Respondent.

Dated April 30, 1888.

203 [Endorsed:] 5162. Supreme court. The Town of Elgin *vs.* The W. & St. Peter R. R. Co. Affidavit of disbursements on trial & notice of taxation of costs. Due service of the within is hereby admitted this 2d day of May, 1888. Wilson & Bowers, att'ys for def't. Davis, Kellogg & Severance, attorneys for plaintiff. Filed May 4, 1888. J. D. Jones, clerk.

204 STATE OF MINNESOTA:

Supreme Court. General April Term, A. D. 1888.

TOWN OF ELGIN, Respondent, *vs.* THE WINONA & ST. PETER RAILROAD COMPANY, Appellant,	43.	5162.

and

TOWN OF PLAINVIEW, Respondent, *vs.* THE WINONA AND ST. PETER RAILROAD COMPANY, Appellant.	44.	5163.

THURSDAY MORNING, 9.30 O'CLOCK, *April 19th, A. D.* 1888.

Court convened pursuant to adjournment, all the parties being present.

These causes came on to be heard this day upon the motion of respondents to dismiss the appeals herein or affirm the judgments of the court below, and upon hearing counsel thereon and upon due consideration thereof it is ordered that the judgments of the court below herein appealed from be, and each of them are hereby, affirmed, for the re-sons stated and given in the opinion of this

court upon the former appeals in these cases from the order of the court below denying a new trial therein, and that the respondents have judgment accordingly; ordered, further, that upon entry of judgment in these causes that all proceedings thereon be stayed for thirty days from and after such entry.

A true record.

Attest: J. D. JONES, *Clerk.*

The foregoing is a full and true copy of the minutes of argument and order in the above-entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest: J. D. JONES, *Clerk.*

205 [Endorsed:] 5162 & 5163. State of Minnesota supreme court. Towns of Plainview & Elgin *vs.* Winona & St. Peter R. R. Co. Copy of minutes of argument and order. Filed ——, A. D. 188–. ——, clerk. R. F. 145.

206 STATE OF MINNESOTA:

Supreme Court. April Term, A. D. 1888.

TOWN OF ELGIN, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant. } No. 43.

Pursuant to an order of court duly made and entered in this cause on the 19th day of April, A. D. 1888, it is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Wabasha, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The Winona & St. Peter Railroad Company, appellant herein, the sum and amount of thirty-nine and $\frac{50}{100}$ dollars ($39.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

By the court.

Attest: J. D. JONES, *Clerk.*

Dated and signed this 9th day of May, 1888.

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees for printing briefs	5 00
Clerk's fees, supreme court	9 50
Execution and return	
Filing mandate and docketing transcript	
Affidavits and acknowledgments	
Postage	
Copying return for printer	
	$39 50

207 [Endorsed:] 5162. State of Minnesota supreme court. Transcript of judgment. Filed May 9th, A. D. 1888. J. D. Jones, clerk. —— ——, attorney for —— ——. Page No. 157, "L" Book.

STATE OF MINNESOTA, *Supreme Court,* } *ss:*

I, J. D. Jones, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 9th day of May, A. D. 1888.

[Seal of the Supreme Court, State of Minnesota.]

J. D. JONES, *Clerk.*

208 Supreme Court of the State of Minnesota.

THE TOWN OF ELGIN, Plaintiff,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

The defendant, The Winona and St. Peter Railroad Company, having duly petitioned for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Minnesota to bring into the former court the judgment of the latter court rendered in this action on the 9th day of May, 1888, against said defendant, in order that said judgment may be reviewed by said Supreme Court of the United States, now, on motion of the attorneys for said defendant, it is hereby ordered that the clerk of the circuit court of the United States for the district of Minnesota issue a writ of error from the Supreme Court of the United States to the supreme court of the State of Minnesota in reference to and to bring into said Supreme Court of the United States for review the judgment of the supreme court of the State of Minnesota in the above-entitled action against the defendant, The Winona and St. Peter Railroad Company, rendered on the 9th day of May, 1888.

It is further ordered hereby that the bond given by the defendant, The Winona and St. Peter Railroad Company, upon the issue of the citation by me in pursuance of said writ of error be in the sum of one hundred thousand dollars and in the form required by law and with sureties to be approved by me.

Dated May 9th, 1888.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

209 Supreme Court, State of Minnesota.

THE TOWN OF ELGIN, Plaintiff,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

The defendant in the above-entitled cause respectfully represents and shows that the above-entitled cause was brought to recover the face value of certain bonds issued by the above-named plaintiff town which the defendant before this action was brought had, for a valuable consideration, acquired and transferred to other holders, and that at the time said bonds were earned and issued they were valid and legal obligations of the plaintiff town, properly and legally issued under and in strict conformity with the then existing statutes and laws of the State of Minnesota, and they were then valid under the decisions of the supreme court of the State of Minnesota theretofore made; that the district court of the State of Minnesota in which this action was begun and the supreme court of Minnesota, in the decision of this case, did disregard and change the decisions of said supreme court before made in such cases and the statutes and laws of the State of Minnesota which were in force when said bonds were earned and issued, in violation of the then existing contract rights of the holders of the said bonds; all of which appears in the records of said supreme court and all of which your petitioner claims and alleges is in violation of the Constitution of the United States forbidding the impairment of the obligation of contracts.

210 And this defendant, your petitioner, further respectfully represents that prior to the commencement of this action and after the transfer of said bonds by this defendant Samuel Marshall and Charles F. Ilsley, who had become the owners of certain of said bonds under this defendant, brought an action thereon against this plaintiff town in the circuit court of the United States for the district of Minnesota, which said court, then and there having jurisdiction of the parties and the subject-matter, held, decided, and adjudged that the said bonds were legal and valid obligations of this plaintiff town, and that it should pay the same to said Marshall and Ilsley; which said judgment was when this action was begun and still is in full force and unreversed and unmodified.

And the said district court of the State of Minnesota and the supreme court of Minnesota failed and refused to give full or any force or effect to said judgment of the said circuit court of the United States, except that each of them held and decided that said judgment was against law and invalid, and that by the rendition and execution thereof this plaintiff town was legally damnified, and that on account of its rendition and the payment of part and the liability to pay the rest of said bonds by plaintiff town thereunder this defendant became and was liable to this plaintiff town in this suit; all of which appears of record in the supreme court of Minnesota; and this defendant, your petitioner, claims and insists that in disallowing validity or effect to the said judgment of the circuit court of the United States the district court and the supreme court of Minnesota

disregarded and violated the Constitution and laws of the United States; that the supreme court of Minnesota is the highest court of that State in which a decision of this suit could be had.

211 This defendant, your petitioner, further represents and shows that it feels aggrieved by the said judgment of the supreme court of Minnesota rendered in this suit on the 9th day of May, A. D. 1888, affirming the judgment of the said district court of Minnesota; and in consideration of the premises, and because it claims that there is drawn in question in this suit the validity of an authority exercised under the United States and the decision of the supreme court of Minnesota was against its validity, and because it claims that in this suit a title, right, privilege, and immunity was by it set up and claimed under the Constitution of the United States and the decision of said supreme court was against such title, right, privilege, and immunity, and because in this suit a title, right, privilege, and immunity was claimed by it under an authority exercised under the United States and the decision was against the title, right, privilege, and immunity claimed or set up under such authority, and because it claims that the said decision of the supreme court of Minnesota changing the operation, force, and meaning of the statutes and laws of the State of Minnesota was an impairment of the obligation of the contract of the plaintiff town with the holders of said bonds, all of which appears by the record of the proceedings in said suit herewith submitted, this defendant claims the right to remove said judgment of the supreme court of Minnesota to the Supreme Court of the United States by writ of error under section 709 of the Rev. Stat. of the United States.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will pray.

St. Paul, May 9, 1888.

THE WINONA & ST. PETER RAILROAD COMPANY,
By THOMAS WILSON, *Its Attorney.*

Allowed this 9th day of May, A. D., 1888.

JAMES GILFILLAN,
Chief Justice Sup. Court, Minn.

[Endorsed:] 5162. Supreme court, State of Minnesota. Town of Elgin, pl'ff, *vs.* The Winona and St. Peter Railroad Company, def't. Petition and order for writ of error. Filed June 7, 1888. J. D. Jones, clerk. Wilson & Bowers, defendant's attorneys, Winona, Minn.

212 Know all men by these presents that we, The Winona & St. Peter Railroad Company, as principal, and Albert Keep, Marvin Hughitt, and Nathaniel K. Fairbanks, all of Chicago, Illinois, as sureties, are held and firmly bound unto the Town of Elgin in the full and just sum of one hundred thousand dollars, to be paid to the said Town of Elgin, its successors, attorneys, or assigns; to

which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a term of the supreme court of the State of Minnesota, in a suit depending in said court between The Town of Elgin, plaintiff, and The Winona and St. Peter Railroad Company, defendant, a judgment was rendered against the said Winona and St. Peter Railroad Company on the 9th day of May, 1888, and the said The Winona and St. Peter Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse said judgment in the aforesaid suit, and a citation, directed to the said Town of Elgin, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Winona and St. Peter Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void;
213 else to remain in full force and virtue.

THE WINONA AND ST. PETER RAILROAD COMPANY, [SEAL.]
By MARVIN HUGHITT, *President.* [SEAL.]
MARVIN HUGHITT. [SEAL.]
ALBERT KEEP. [SEAL.]
NATHANIEL K. FAIRBANK. [SEAL.]

Attest: J. B. REDFIELD, *Secretary.*

Sealed and delivered in presence of—
J. L. McKITTRICK.
A. W. PALVER.

[Endorsed:] 5162. Town of Elgin, pl'ff, *vs.* The Winona & St. Peter Railroad Company, def't. Bond on writ of error. Filed June 7, 1888. J. D. Jones, clerk.

Approved by me this 7th day of June, 1888, and ordered that upon the filing of said bond the writ of error taken as in said bond recited shall operate as a supersedeas and stay execution of said judgment referred to in said bond.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

214 And on the 7th day of June, 1888, the original writ of error in this action, which said writ is returned herewith, and a copy thereof were lodged and filed by defendant, The Winona and St. Peter Railroad Company, in the office of the clerk of said supreme court of the State of Minnesota.

215 On the 28th day of August, 1886, there was filed in the office of the clerk of the supreme court of the State of Minnesota a return to said supreme court from the district court of the State of Minnesota for the county of Wabasha, which was in its words and figures and in all respects the same as the return to said supreme court from said district court for the county of Wabasha, which was filed in the office of said supreme court as aforesaid on the 7th day of November, 1887, and which is hereinbefore fully set forth, except that the said return filed as aforesaid on the 28th day of August, 1886, differs from the said return filed as aforesaid on the 7th day of November, 1887, in that the former, being also the earlier, of said two returns did not contain the following-named papers contained and set forth as aforesaid in and being parts of said later return, to wit, the parts of said later return appearing therein hereinbefore after he notice of appeal from the order of the district court for Wabasha county during a new trial and being the following five papers: The mandate from the supreme court to the district court for Wabasha county, dated July 25th, 1887; the judgment of the district court of Wabasha county; the notice of appeal from said judgment of the district court for Wabasha county; the appeal bond, dated August first, 1887, and approved August 12th, 1887, given upon the appeal from said judgment of the district court for Wabasha county, and the certificate, dated November 4th, 1887, of the clerk of the district court for Wabasha county to the said return, filed in the office of the clerk of the supreme court of the State of Minnesota on the 7th day of November, 1887; and except, further, that said earlier return. filed on the 28th day of August, 1886, differs also from said later return, filed on the 7th day of November, 1887, in that the former, earlier, return contained the following papers and parts which were not contained in said later return, and are therefore not hereinbefore

216 set forth, to wit: Bond on appeal from the order of the district court for Wabasha county denying defendant's motion for a new trial, which bond is dated June 2nd, 1886, and was approved June 4th, 1886, and the certificate, dated August 23rd, 1886, of the clerk of the district court for Wabasha county; all of which said papers not contained in said later return and not hereinbefore fully set forth are in the words and figures following, to wit:

217 STATE OF MINNESOTA, } ss:
County of Wabasha, }

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff & Respondent,
against
THE WINONA & ST. PETER RAILROAD COMPANY, Defendant & Appellant.

Know all men by these presents that we, The Winona & St. Peter Railroad Company, as principal, and Henry W. Lamberton, of the city of Winona, county of Winona, and State of Minnesota, as

surety, are held and firmly bound unto The Town of Elgin, plaintiff above-named, in the sum of ten thousand dollars, lawful money of the United States, to be paid unto the said Town of Elgin, its successors or assigns; for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 2nd day of June, A. D. 1886.

The condition of this obligation is such that whereas the said defendant, "The Winona and St. Peter Railroad Company," has appealed to the supreme court of the State of Minnesota from an order of the district court, entered on the 22nd day of May,
218 1886, denying defendant's motion for a new trial of the above-entitled action:

Now, therefore, if said defendant, "The Winona & St. Peter Railroad Company," shall pay all costs and charges that may be awarded against it on said appeal and all damage sustained by the respondent, The Town of Elgin, in consequence thereof if said order appealed from or any part thereof is affirmed or said appeal is dismissed, not exceeding the penalty of this bond, and if said defendant shall abide and satisfy the judgment or order of said supreme court, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 2nd day of June, A. D. 1886.

WINONA & ST. PETER RAILROAD COMPANY,
By THOMAS WILSON, *Its Attorney.*
HENRY W. LAMBERTON.

Signed, sealed, and delivered in presence of—
B. T. HEUSTON, JR.
H. M. LAMBERTON.

219 STATE OF MINNESOTA, } ss:
County of Winona, }

On this 2nd day of June, 1886, before me, a notary public in and for the county of Winona and State of Minnesota, personally appeared Henry W. Lamberton, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed; and before me, on said day, also appeared Thomas Wilson, to me known to be the person who executed the foregoing instrument in behalf of the Winona & St. Peter Railroad Company, and acknowledged that he executed the same as the free act and deed of said Winona Railroad Company.

[SEAL.] H. M. LAMBERTON,
Notary Public, Winona County.

STATE OF MINNESOTA, } ss:
County of Winona, }

Henry W. Lamberton, having first been duly sworn, says that he

is the surety named in the foregoing bond; that he is a resident and freeholder of the State of Minnesota, and that he is worth the sum of twenty thousand dollars above his debts and liabilities and exclusive of his property exempt from execution.

HENRY W. LAMBERTON.

Subscribed and sworn to before me this 2nd day of July, A. D. 1886.

[SEAL.]

H. M. LAMBERTON,
Notary Public, Winona Co., Minn.

220 Endorsed: District court, county of Wabasha. The Town of Elgin, pl'ff & resp't, *vs.* The W. & St. P. R. R. Co., def't & app'l't. Bond on appeal. I hereby approve the within bond and the sureties thereon. Dated June 4, A. D. 1886. L. W. Collins, judge. Wilson & Bowers, att'ys for def't, Winona, Minn. Filed June 8, 1886. Chas. J. Stauff, clerk.

221 STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

I, Chas. J. Stauff, clerk of the district court in and for Wabasha county and State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original summons, complaint, amended complaint, answer, reply, case, notice of motion for new trial, order denying motion, notice of appeal, and bond on appeal in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Wabasha, this 23d day of August, A. D. 1886.

[Seal of District Court.]

CHAS. J. STAUFF,
Clerk District Court, Wabasha County, Minn.

[Endorsed:] 4633. Supreme court, State of Minnesota. The Town of Elgin against The Winona & St. Peter Railroad Company. Certified copy of return on appeal. Filed Aug. 28, 1886. Sam. H. Nichols, clerk.

And after the filing in said supreme court of the State of Minnesota of said return from the district court for Wabasha county, which was filed as aforesaid on the 28th day of August, 1886, the following proceedings were had in said cause in the said supreme court of the State of Minnesota, to wit:

222 STATE OF MINNESOTA:

Supreme Court. General April Term, A. D. 1888.

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER R. R. Co., Appellant. } 4634.

THE TOWN OF ELGIN, Respondent,
vs.
THE WINONA & ST. PETER R. R. Co., Appellant. } 4633.

MONDAY MORNING, 9.30 O'CLOCK, *May 2nd, A. D.* 1887.

Court convened pursuant to adjournment, all the justices being present.

This cause came on to be heard this day upon motion of counsel for appellant for a stay of proceedings therein.

It is ordered that all proceedings in each of said causes be stayed for the period of thirty-five days from the date of this order.

A true record.

Attest: J. D. JONES, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: ——— ———, *Clerk.*

[Endorsed:] State of Minnesota supreme court. Copy of minutes of argument. Filed ——— —, A. D. 188–. ——— ———, clerk.

223 STATE OF MINNESOTA:

Supreme Court. General April Term, A. D. 1887.

THE TOWN OF ELGIN, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant, } 4633.

and

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY, Appellant.

MONDAY MORNING, 9.30 O'CLOCK, *June 6, A. D.* 1887.

The court convened pursuant to adjournment, all the justices being present.

It is ordered that the stay of proceedings heretofore granted in these causes be, and the same is hereby, continued until the determination of the motion on application for reargument therein.

A true record.

Attest: J. D. JONES, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: ——— ———, *Clerk.*

[Endorsed:] State of Minnesota supreme court. Copy of minutes of argument. Filed ——— —, A. D. 188–. ——— ———, clerk.

224 STATE OF MINNESOTA:

Supreme Court.

THE TOWN OF PLAINVIEW
vs.
THE WINONA & ST. PETER RAILROAD COMPANY.

THE TOWN OF ELGIN
v.
THE WINONA & ST. PETER RAILROAD COMPANY.

The application for leave to reargue the above-entitled causes *are* hereby denied and the stay of proceedings in each case vacated.

July 21, 1887.

JAMES GILFILLAN,
Chief Justice.

[Endorsed:] 4633 & 4634. Order. Filed July 21, 1887. J. D. Jones, clerk.

225 STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1886.

THE TOWN OF ELGIN, Respondent,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY, Appellant. } No. 49.

Appeal from district court, third judicial district, county of Wabasha

This cause having been duly argued and submitted at the general October term of this court, A. D. 1886, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered July 25th, A. D. 1887.

By the court.

Attest: J. D. JONES, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

[Seal of Supreme Court.]

Attest: J. D. JONES, *Clerk.*

[Endorsed:] No. 4633. State of Minnesota supreme court. Copy of order for judgment. Filed July 25, A. D. 1887. J. D. Jones, clerk. Entered on page 414, — "E."

226 STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1886.

THE TOWN OF ELGIN, Respondent,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY, Appellant. } No. 49. 4633.

Pursuant to an order of the court duly made and entered in this cause on the 25th day of July, A. D. 1887, it is here and hereby determined and adjudged that the order of the court below, herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Wabasha, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The Winona and St. Peter Railroad Company, appellant herein, the sum and amount of thirty-seven and $\frac{60}{100}$ dollars ($37.60), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 25th day of July, 1887.

By the court.

Attest: J. D. JONES, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printers' fees for printing paper book and briefs, etc.	
Clerk's fees, supreme court	12 60
Execution and return	
Filing mandate and docketing transcript	
— affidavits and acknowledgments	
Postage	
Copying return for printer	
	$37 60

227 [Endorsed:] 4633. State of Minnesota supreme court. Transcript of judgment. Filed July 25, A. D. 1887. J. D. Jones, clerk. C. K. Davis, Kellogg and Eaton, & C. W. Brown, attorneys for resp't. Page No. 327, "I" Book.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, J. D. Jones, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the

cause therein entitled as appears from the original remaining of record in my office; that I have carefully compared the within copy with the said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 25th day of July, A. D. 1887.

[Seal of Supreme Court.]

J. D. JONES, *Clerk.*

228 And on the 28th day of April, 1887, there was handed down and filed in the office of the clerk of the supreme court of the State of Minnesota the syllabus and opinion of said supreme court in this cause in words and figures following, to wit:

229 *Opinion.*

STATE OF MINNESOTA:

Supreme Court.

THE TOWN OF ELGIN, Respondent,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY, Appellant.

This case was argued and submitted with the case of The Town of Plainview against the same defendant and involves the same questions.

Order affirmed.

[Endorsed:] State of Minnesota supreme court. The Town of Elgin, respondent, *vs.* The Winona & St. Peter Railroad Company, appellant. Filed April 28, 1887. J. D. Jones, clerk. October term, 1886. Vanderburgh, J.

And on the same, 28th, day of April, 1887, there was handed down & filed in the office of the clerk of the supreme court of the State of Minnesota the syllabus and opinion of said supreme court in the action of the Town of Plainview, plaintiff, against The Winona & St. Peter Railroad Company, defendant, being the only opinion of said court in said cause, in words and figures following, to wit:

230 *Syllabus.*

STATE OF MINNESOTA:

Supreme Court. October Term, 1886.

THE TOWN OF PLAINVIEW, Respondent,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY, Appellant.

An agreement entered into between a railway Co. and the authorities of a town upon petition of a majority of the tax-payers, in pur-

suance of the provisions of sec. 7, ch. 106, Laws 1877, for the issuance of the bonds of such town is invalid and imposes no legal obligation upon the town by reason of the unconstitutionality of the statute, and the latter in its corporate capacity is not estopped to resist the enforcement of bonds so issued by the completion of a line of railroad under the agreement by such company, following Harrington *vs.* Plainview, 27 Minn., 224.

Where a railroad company procured negotiable bonds to be so issued by the officers of a town under the section of the statute referred to, which were in form the obligations of the town and recited on their face that they were issued under such an agreement, and which were accepted by such company and negotiated and transferred by it for the full face value thereof, and were subsequently negotiated and sold to the citizens of another State, who, in an action in the circuit court of the United States brought against the town to recover overdue interest, and tried upon the merits, recovered final judgment therefor, which fixed the liability of the town for the whole amount of such bonds to the holders thereof: held, that
231 the acts of the company in procuring and negotiating the bonds were without authority of law and wrongful, and that by reason thereof a cause of action arose in favor of the town and against the company for the recovery of the amount of such bonds with interest.

Under Special Laws, 1881, ch. 414, upon the purchase of the Winona & St. Peter R. R. Co. of the property and franchises of the Plainview R. R. Co. it succeeded to the liabilities of the latter company, including the claim involved in this suit.

Opinion.

STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1886.

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant.

The Town of Plainview seeks to recover the value of certain bonds issued by its officers in its behalf and alleged to have been procured by the Plainview Railway Co. without authority of law, and thereafter negotiated, and which the town have in consequence paid or are obliged to pay to the present owners. The case presents some novel features and involves questions of considerable doubt and difficulty, in the solution of which the court can find but little aid from precedents.

The question of the validity of these bonds was considered and determined in the case of Harrington *vs.* this plaintiff and the Plainview R. R. Co., 27 Minn. R., 228, adversely to the railroad
232 company, and that decision must be accepted, without further discussion, as the law governing this case.

The bonds were not issued upon the vote of the electors of the town in pursuance of Laws 1877, ch. 106, sec. 5, but in pursuance

of sec. 7 of that act, upon a petition of a majority of the tax-payers. The proceedings to procure such bonds were initiated and prosecuted by the railway company under the act by filing with the town clerk its proposition in writing for the issuance to it of the bonds of the town, as provided by section 4, and thereafter in securing and filing the petition of the tax-payers, as directed by section 7.

We have no hesitation in saying that the evidence in the case is sufficient to uphold the finding of the trial court that the bonds in controversy were issued to the Plainview R. R. Co. and were by its agents transferred to the Chicago and Northwestern R. R. Co. at their par value and in consideration of the amount due the latter company, which had been previously advanced by the Chicago Company in aid of the construction of the Plainview Company's road.

Before the issuance of the bonds the action above referred to was commenced to enjoin the same, and while the case was pending in this court the bonds were issued and transferred.

The evidence, however, does not warrant the conclusion that there was any actual fraud in the procurement or transfer of the bonds. Both railway companies were cognizant of the pendency of the action and of the grounds of the alleged invalidity of the bonds, but the legal questions involved were still open and in dispute, and they were advised and believed them to be legal and valid.

233 It is affirmed by the trial court upon sufficient evidence that, except as appears upon the face of the bonds, Marshall & Ilsey and others, to whom they were subsequently transferred, had no notice of the suit and were *bona fide* purchasers and holders for value. The Chicago & N. W. R. R. Co. was a foreign corporation, and the subsequent purchasers of the bonds were and are citizens of other States.

The bonds all recite on their face that they were issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of the town, and also "in pursuance of a mutual agreement, which agreement was made in accordance with the laws of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor signed by a majority of the resident tax-payers, said agreement having been fully performed by said railroad company on its part."

This court held in the Harrington case that an agreement consummated by proceedings under the provision of the statute referred to, between the railway company and a majority of the tax-payers, could not under the constitution be considered as the lawful agreement of the town nor be of any binding obligation as such, and that bonds issued in pursuance thereof would be void except in the hands of *bona fide* purchasers.

1. These bonds were invalid in the hands of the Plainview Company and could not have been enforced by it.

It was not material that the company had executed the so-called agreement on its part by building the road. It proceeded on its

own motion and at its own peril. There was no agreement made with the town; for it was necessary to secure the consent
234 of the voters, who are the contracting party in its behalf, and the supervisors are simply agents of the town to carry out an agreement duly authorized.

Rochester *vs.* Alfred Bank, 13 Wis., 432.
Lawson *vs.* Schelling, 33 Wis., 294.

The town in its corporate capacity has received nothing and withholds nothing. It has been guilty of no laches, has waived nothing, and there is no estoppel.

It represents the public and is itself entitled to be protected against the authorized acts of its own officers, when it can be done without injury to third parties.

Thomas *vs.* Richmond, 12 Wall., 356.
Town So. Ottawa *vs.* Perkins, 94 U. S., 261.

2. In our opinion the recitals in the bonds were sufficient to put the purchasers, Marshall & Ilsey, or others upon inquiry as respects the authority under which bonds were entitled to be issued and the manner in which they were in fact issued. As we construe the bond, therefore, all purchasers are chargeable with notice of the invalidity thereof by the recitals.

3. Marshall & Ilsey, however, brought suit upon the coupons of these bonds as they matured and recovered thereon in the circuit court of the U. S. for the district of Minnesota in a sum less than $5,000, and the bonds have been duly adjudged and determined in a trial upon the merits in that court to be valid in their hands.

For the purpose of this case, we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is in any event to make the bonds valid, negotiable securities, held by Marshall & Ilsey as *bona fide* purchasers.
235 In other words, it is sufficient to say that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon and notwithstanding the recitals therein.

The result would be the same if that court had differed with this court on questions of fact resting upon evidence *de hors* the bonds, as to their execution or the *bona fides* of their transfer to the present holders, and the Plainview Company and defendant not having been parties to that action, this plaintiff is not estopped from litigating the question involved in this case in the State courts.

The judgment of the circuit court cannot be reviewed or modified by the State courts, and it is not questioned, as we believe, in this case that the result of the decision and judgement of the circuit court is to fix irrevocably the liability of the town for the whole amount of the indebtedness evidenced by the bonds.

Beloit *vs.* Morgan, 7 Wallace, 619.

It must therefore be deemed to have been conclusively settled that

the bonds have been transferred to parties in whose hands they have become valid and legal obligations against the plaintiff town.

On the other hand, it was also conclusively determined that the bonds were void in the hands of the Plainview Co. by the judgment of this court in the Harrington case. Upon that question the Plainview Co. had its day in court in the case referred to, and the issuance and disposition of the bonds must be treated by the State courts as unlawful and wrongful, and it is immaterial that the agents of the company entertained mistaken views of their legal rights in the premises.

Comstock *vs.* Hier, 73 N. Y., 275.

236 If it be conceded that these bonds, when once placed on the market, were liable to pass into the hands of purchasers who would be entitled to enforce the same as valid negotiable securities in the U. S. courts, as the result in this case has proved, it must necessarily follow, we think, that plaintiff has a cause of action for damages. Of course, the extent of the injury would depend upon the result of the negotiation of the securities, and in any particular case courts might differ in their determination of the question whether or not the purchasers were *bona fide* holders, upon evidence either *de hors* or appearing on the face of the instruments.

If these bonds had not indicated the provisions of the statute under which they were issued the plaintiff would have been entitled to an injunction to restrain the negotiation thereof, and if negotiated in the same manner as they have been and purchased by the same parties plaintiff's right of action for the face value of the bonds and interest would be unquestioned.

Comstock *vs.* Hier, *supra.*

Thayer *vs.* Manley, 73 N. Y., 308.

But in their practical results the case supposed and the case at bar are alike. The Plainview Co. transferred the same for full value in payment for moneys advanced for building the road and Marshall & Ilsey paid nearly par for them. They were treated by all parties, as valuable commercial securities, placed on the market and sold and enforced as such against the defendant.

If the bonds are invalid and the Plainview Company acquired no title to them as obligations of the towns, upon what principle can it claim to be entitled to the proceeds as its property? In Comstock *vs.* Hier, *supra*, the court say: "It would be illogical,

237 conceding the invalidity of the note in the hands of the defendants and the non-liability of the plaintiff to them, to hold that the defendants would acquire a title to the proceeds of the note by a transfer of the same to a third person. A party cannot fortify his title to property by a sale, as the title to proceeds upon sale will be the same as to the property before sale.

I am of opinion that the plaintiff had an election of remedies, trover, for the conversion of the note or an action for money had and received for the amount which the defendants realized upon the sale of the note. This follows from the conceded rule that the de-

fendants were without title to the note or authority to dispose of the same."

In Chitty on Bills, 251, the author says: "Where a note or bill was void in its creation the party entitled to the instrument may maintain an action of detinue or trover to recover the same or its value or assumpsit for money had and received if the proceeds of the bill have been received."

And in Lamb *vs.* Clark, 5 Pick., 197, the court say: "There are cases where a party may have an election of remedies, as where there has been a tortuous taking of his property he may bring trespass or trover or he may waive both and bring assumpsit for the proceeds when it has been converted into money."

In such case the maker is regarded as the party entitled to the note as against the holder, whose transfer of the same is liable to work an injury to the former by imposing on him a liability which could not be enforced by the payee, so as to validate that which was before unlawful or unauthorized.

And there appears to be no question that where a person has wrongfully obtained possession of the property of another and
238 has sold and received the money for it the real owner may waive the tort and bring an action for money had and received. He has his election to sue for a conversion or he may affirm the transaction and recover of the wrongdoer for the proceeds; in which case the title to the property sold will be confirmed in the purchaser.

Solutis prelii emptionis loco habetur.

Lamb *vs.* Clark, 5 Pick., 197.

4 Wait's Ac. & Def., 472–'5, & cases.

In this case, since the Plainview Co. received the full face value of the bonds, the amount of the recovery, if any is had, would be the same in either form of action, and the allegations of the complaint and findings of fact are sufficient to support the action in either form. The title to the bonds has been confirmed in the present holders, and they have recovered or will recover the full amount thereof, and the liability of the town has been fixed through the acts of the Plainview Co. in procuring and negotiating the same, which acts this court holds to have been unauthorized and wrongful. Upon what theory, then, can that corporation claim either that it should be exempted from the consequences of such acts or that it is entitled to retain the proceeds of the bonds? They are in form the bonds of the town, and were procured, held, and negotiated as its obligations, and were treated as negotiable securities and set afloat as such, and that such proceedings should result in their enforcement must be presumed to have been intended and contemplated by the company, either in their own hands or by purchasers who might occupy a more advantageous position; and it will not be permitted to object that the bonds are of no value or allege its own wrong for the purpose of defeating this action.

Comstock *vs.* Hier, *supra*, 276.

Lamb *vs.* Clark, *supra.*

239 Had that company brought suit upon the bonds the whole controversy would have been settled in one action; but the plaintiff is not estopped by the result of the suit of Marshall & Ilsey, to which the Plainview Co. was not a party, and is not therefore concluded by the determination in that case.

4. The Winona & St. Peter R. R. is made defendant because it has purchased and succeeded to all the rights of the Plainview R. R. Co. in pursuance of Sp. Laws 1881, ch. 414, under which it was authorized to make such purchase, "subject to all demands, claims, and rights of action against said Plainview Co. arising out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview and Elgin to said Plainview R. R. Co.," &c.

The purchasing company acquired the property and franchises of the Plainview Co. by virtue of that act, and of course took the grant *cum onere* and subject to the provisions and conditions of the act.

Chicago, St. P., M. & O. R'y *vs.* Lindstrum, 201 M. R., 199.

We are of the opinion that the plaintiff was entitled to recover and that the order denying a new trial should be affirmed.

VANDERBURGH, *J.*

Justice Berry concurs.

We concur in the conclusions expressed in the foregoing opinion, but we would base the responsibility of the Plainview Company distinctly upon the following considerations:

That company having procured the unauthorized execution and delivery to itself of these bonds, in form expressing the obligation of the town, and having negotiated the same, so that they have thus come into the hands of parties who have enforced a recovery
240 upon them by proper action in a competent tribunal, the corporation is answerable for its own unauthorized acts which have resulted in this injury to the town, unless this consequence—the recovery upon the bonds—is to be deemed too remote to afford a ground of legal liability. As respects the acts of the Plainview Company this injurious consequence is not remote, but proximate. The damage suffered by the town consists in its being compelled to pay these bonds; but that is just what the Plainview Company must be deemed to have contemplated when it negotiated for, procured, and disposed of the bonds. No other purpose or object can be ascribed to it than that, either in its own hands or in the hands of future holders, the bonds should be paid by the town, voluntarily or by legal compulsion. One charged with responsibility for his own acts resulting in injury to another should not be heard to say that the injurious consequence is too remote to subject him to liability if he actually contemplated that consequence, although others might not have anticipated such a result. That the judgment by which the liability of the town to pay the bonds has been conclusivly established was erroneous does not make remote the damage thus resulting to the town, if this result—the enforcement of the

bonds—was within the purpose of the company when it procured and negotiated them as the obligations of the town. It is argued that the company could not have anticipated an erroneous decision and should not be held liable for the consequences of such a decision. Probably it did not anticipate or suppose that an adjudication holding the town obligated to pay the bonds would be erroneously made, for it may have supposed the bonds to be valid and rightfully enforceable; but the fact that it did not suppose that such an adjudication would be erroneous does not make remote
241 the damage complained of. It is proximate, and liability follows because the company procured and negotiated these unauthorized securities as the obligations of the town, to be enforced as such, and because they have been so enforced in a court having jurisdiction, as the corporation anticipated they would be.

GILFILLAN, *C. J.*
DICKINSON, *J.*

Mitchell, J., dissents.

STATE OF MINNESOTA, *ss:*

I, James Gilfillan, chief justice of the supreme court of the State of Minnesota, do hereby certify that the decision and judgment of said supreme court affirming the judgment of the district court for Wabasha county in the action of The Town of Elgin, plaintiff, against The Winona and St. Peter Railroad Company, defendant, which said judgment bears date July 30th, 1887, and from which said defendant, The Winona and St. Peter Railroad Company, appealed to said supreme court, were rendered and based by said supreme court upon the same reasons and grounds as are stated in the opinion of said supreme court in the action of The Town of Plainview, plaintiff, against The Winona and St. Peter Railroad Company, defendant, of which opinion a copy is hereinbefore set forth and hereto attached and referred to as a part of this certificate.

Oct. 1, 1888.

JAMES GILFILLAN.

242 STATE OF MINNESOTA, *ss:*

I, J. D. Jones, clerk of the supreme court of the State of Minnesota, hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in the above-entitled cause between The Town of Elgin, plaintiff, and The Winona and St. Peter Railroad Company, defendant, as fully as the same remains of record and on file in my office.

And I hereby further certify that the last two papers in the foregoing transcript, to the second of which is attached a certificate of the chief justice of this court, which said two papers immediately precede this certificate of mine, and which purport to be respectively the syllabus and opinion of said supreme court of the State of Minnesota in the action between The Town of Elgin, plaintiff, and The Winona and St. Peter Railroad Company, defendant, and the syllabus and opinion of said supreme court of the State of Minnesota in the action between The Town of Plainview, plaintiff, and The Winona

and St. Peter Railroad Company, defendant, are a part of the respective records of said actions in said supreme court, each being a part of the record of the action in which it purports to have been rendered, and that each of said last two papers purporting to be copies of the opinions of said supreme court in said causes is a full, true, and correct copy of the syllabus and opinion of said supreme court of the State of Minnesota in said cause in which it purports to have been rendered on file in the office of said supreme court, and of the only such syllabus or opinion.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of the State of Minnesota, at my office, as clerk of said supreme court, in the city of St. Paul, Minnesota, on this 2nd day of October, 1888.

[Seal of the Supreme Court, State of Minnesota.]

J. D. JONES,
Clerk of Sup. Court, Minn.

243 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Town of Elgin, plaintiff, and The Winona & St. Peter Railroad Company, defendant, wherein was drawn in question a title, right, privilege, and immunity set up and claimed under the Constitution of the United States, and the decision was against such title, right, privilege, and immunity; and wherein was set up a title, right, privilege, and immunity under an authority exercised under the United States, and the decision was against the title, right, privilege, and immunity claimed or set up under such authority; and wherein it is alleged that the decision was an impairment of the obligation of the contract in question and set up in said suit, and therefore a violation of the Constitution of the United States; and wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein
was drawn in question the construction of a clause of
244 the Constitution or of a treaty or statute of or commission
held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, The Winona & St. Peter Railroad Company, as by its complaint appears, we, being willing that error, if any

hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Samuel F. Miller, the presiding justice of the Supreme Court, the 7th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal U. S. Circuit Court, Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States
for the District of Minnesota.

Allowed by—
JAMES GILFILLAN,
Chief Justice of the Supreme Court, Minnesota.

245 [Endorsed:] 5162. Town of Elgin, def't in error, *vs.* Winona & St. Peter Railroad Company, pl'ff in error. Writ of error. Filed June 7, 1888. J. D. Jones, clerk.

246 The United States of America to the Town of Elgin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Winona and St. Peter Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, the presiding justice of the Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

247 [Endorsed:] 5162. Town of Elgin, def't in error, *vs.* Winona & St. Peter Railroad Company, pl'ff in error. Citation. Filed June 19, 1888. J. D. Jones, clerk.

On this 9th day of June, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared before me the subscriber, William Burns, and makes oath that on June 8th, 1888,

at Rochester, Minnesota, he delivered a true copy of the within citation to Frank B. Kellogg in person, who from the commencement of the action of The Town of Elgin against The Winona & St. Peter Railroad Company has been and still is attorney of record for said Town of Elgin in said action.

WILLIAM BURNS.

Sworn to and subscribed the 9th day of June, A. D. 1888.

[Notarial Seal, Winona Co., Minn.]

LLOYD W. BOWERS,
Notary Public, Winona County, Minn.

248 Supreme Court of the United States.

THE WINONA AND ST. PETER RAILROAD COMPANY, Plaintiff in Error,
against
THE TOWN OF ELGIN, Defendant in Error.

The plaintiff in error, The Winona and St. Peter Railroad Company, hereby assigns the following errors in the above-entitled cause and court, each and all of which errors it will urge in said Supreme Court of the United States in said above-entitled cause, viz:

1st. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give full faith and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against said town of Elgin upon interest coupons of the bonds of said town of Elgin described and referred to in the complaint in this action.

2nd. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such
249 faith and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against said town of Elgin upon interest coupons of the bonds of said town of Elgin described and referred to in the complaint as such judgment, record, or proceeding would have and be entitled to by the law and usage of the United States.

3rd. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the

several actions brought in that court by Marshall and Illsley against said town of Elgin upon interest coupons of the bonds of said town of Elgin described and referred to in the complaint as such judgment, record, or proceeding would have and be entitled to by law and usage in the circuit court of the United States in and for the district of Minnesota.

4th. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith
250 and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against said town of Elgin upon interest coupons of the bonds of said town of Elgin described and referred to in the complaint as such judgment, record, or proceeding should have and was entitled to under section 905 of the United States Revised Statutes.

5th. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith and credit to any of the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought by Marshall and Illsley against said town of Elgin upon interest coupons of the bonds of said town of Elgin described and referred to in the complaint in this action as such judgment has by law and usage in the courts of the State from which it was taken.

6th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith and credit to
251 any of the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought by Marshall and Illsley against said town of Elgin upon interest coupons of the bonds of said town of Elgin described and referred to in the complaint in this action as such judgment should have and was entitled to under section 905 of the Revised Statutes of the United States.

7th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering said judgment said supreme court of the State of Minnesota held and decided, and such judgment against said plaintiff in error was founded upon such decision, that the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against The Town of Elgin were

each and all erroneous and contrary to law, and that this plaintiff in error was legally responsible for the rendering of such erroneous judgments and for the liability imposed upon said town of Elgin by such erroneous judgment, and that this plaintiff in error should therefore in this action be adjudged liable to said town of Elgin, as, in fact, it was adjudged liable.

8th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should
252 be reversed, for the reason that said judgment is in contravention of article 4, section 1, of the Constitution of the United States and section 905 of the Revised Statutes of the United States with reference to the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought by Marshall and Illsley against said town of Elgin.

9th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that neither the decision of the supreme court of the State of Minnesota in the case of Harrington against The Town of Plainview upon the constitutionality of section 7 of chapter 106 of the General Laws of Minnesota of 1877 (which decision is reported in volume 27 of the Minnesota Reports, page 224 *et seq.*) nor the decision of said State supreme court in this action upon the constitutionality of said section 7 of chapter 106 of the General Laws of Minnesota of 1877 could, under the Constitution of the United States forbidding the passage by a State of any law impairing the obligation of contracts, be made retroactive so as to affect the question of the validity of the bonds of the town of Elgin described and referred to in the complaint in this action or of the contract between said town of Elgin and the Plainview Railroad Company under and in pursuance of which said bonds described in the complaint in this action were issued, and the decision and judgment of said supreme court of the State of Minnesota in this case
253 that said section 7 of chapter 106 of the General Laws of Minnesota of 1877 was in violation of the constitution of Minnesota, and so unconstitutional and void, and that for that reason the said bonds of the town of Elgin referred to in the complaint in this action and the said contract between the said town of Elgin and the Plainview Railroad Company under which said bonds were issued were and are invalid, was and is an impairment of the obligation of said bonds of the town of Elgin referred to in the complaint in this action and of the contract between said town of Elgin and the Plainview Railroad Company, under which said bonds were issued, and said decision and judgment in this action against this plaintiff in error were and are in violation of article 1, section 10, of the Constitution of the United States, providing that no State should pass any law impairing the obligation of contracts.

10th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the

ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that said judgment in this action was and is an impairment of the obligation of the bonds described and referred to in the complaint in this action and of the contract between the town of Elgin and the Plainview Railroad Company under and in pursuance of which said bonds were issued by said town of Elgin, and said judgment was and is within the prohibition and in violation of article 1, section 10, of the Constitution of the United States, providing that no State shall pass any law impairing
254 the obligation of contracts.

11th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that by the legislative enactments of the State of Minnesota existing at the time of the issue to the Plainview Railroad Company of the bonds of the town of Elgin described and referred to in the complaint in this action and at the time of the making of the contract between said town of Elgin and said Plainview Railroad Company under and in pursuance of which said bonds were so issued said bonds of the town of Elgin and said contract under which they were issued were legal and valid, and that by said judgment in this action against this plaintiff in error the supreme court of the State of Minnesota gave such force and effect to the provisions of the constitution of said State of Minnesota under which section 7 of chapter 106 of the General Laws of Minnesota of 1877 was by said supreme court of the State of Minnesota decided to be unconstitutional and void as thereby to make said provisions of the constitution of the State of Minnesota impair the obligation of the said bonds of the town of Elgin and of the contract between said town of Elgin and the Plainview Railroad Company under which said bonds were issued.

12th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should
255 be reversed, for the reason that by the law of the State of Minnesota existing at the time of the issue to the Plainview Railroad Company of the bonds of the town of Elgin described and referred to in the complaint in this action and at the time of the making of the contract between said town of Elgin and said Plainview Railroad Company under and in pursuance of which said bonds were so issued said bonds of the town of Elgin and said contract under which they were issued were legal and valid and were existing obligations of said town of Elgin under and in accordance with the then existing laws of the State of Minnesota, and that after the issue of said bonds to the Plainview Railroad Company the constitution and statutes of the State of Minnesota were changed so that the bonds of towns could no longer legally or validly be given or issued under or pursuant to section 7 of chapter 106 of the General Laws of Minnesota of 1877, and said section 7 of chapter 106 of the General Laws of Minnesota of 1877 was made and became

unconstitutional and void under the constitution of the State of Minnesota, and that by its said judgment against the plaintiff in error in this action the supreme court of the State of Minnesota gave effect to and upheld and applied said change in the constitution and statutes of the State of Minnesota so as thereby and by reason of such change in said constitution and statutes to decide and adjudge that the said bonds of the town of Elgin described and referred to in the complaint in this action and the said contract between said town of Elgin and the Plainview Railroad Com-
256 pany under and in pursuance of which said bonds were issued were illegal and invalid, and so as thereby to make said change in the constitution and statutes of the State of Minnesota after the issue of said bonds of the town of Elgin to the Plainview Railroad Company impair the obligation of said bonds and of the contract between said town of Elgin and said Plainview Railroad Company in pursuance of which said bonds were issued.

13th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that by its said judgment against this said plaintiff in error the supreme court of the State of Minnesota decided, and said judgment was based upon such decision, that section 7 of chapter 106 of the General Laws of Minnesota of 1877 was unconstitutional and void because in violation of the constitution of said State of Minnesota, and that therefore the bonds of the town of Elgin described and referred to in the complaint in this action and the contract under which they were issued to the Plainview Railroad Company were invalid, though said contract was made and said bonds were so issued to the Plainview Railroad Company before said section 7 of chapter 106 of the General Laws of Minnesota of 1877 had ever been decided or adjudged to be void by any court of the State of Minnesota, and though said section 7 of chapter 106 of the General Laws of Minnesota of 1877 was a valid and
257 existing statute of the State of Minnesota at the time of the issue of said bonds of the town of Elgin to the Plainview Railroad Company and at the time of the making of the contract between said town of Elgin and said Plainview Railroad Company under and in pursuance of which said bonds were issued.

14th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that by its said judgment against this plaintiff in error the supreme court of the State of Minnesota decided, and said judgment was based upon such decision, that section 7 of chapter 106 of the General Laws of Minnesota of 1877 was unconstitutional and void because in violation of the constitution of said State of Minnesota, and that for that reason the bonds of the town of Elgin described and referred to in the complaint in this action and the contract between said town of Elgin and the Plainview Railroad Company under and in pursuance of which said bonds were issued were illegal and invalid, though at the time when said

bonds of the town of Elgin were so issued to the Plainview Railroad Company, and also at the time when said contract between the town of Elgin and the Plainview Railroad Company was made under and in pursuance of which said bonds were issued, said section 7 of chapter 106 of the General Laws of Minnesota of 1877 was constitutional and valid and an existing statute of the State of Minnesota under and according to the then existing decisions and adjudications of the supreme court of the State of Minnesota.

258 15th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was drawn in question in said above-entitled cause in the supreme court of the State of Minnesota the validity of an authority exercised under the United States and the decision and the said judgment of the said supreme court of the State of Minnesota in said above-entitled cause was against the validity of such authority.

16th. The judgment of the supreme court of the State of Minnesota rendered in said above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was claimed by this plaintiff in error in said above-entitled cause in the supreme court of the State of Minnesota a right, title, privilege, and immunity under the Constitution and laws of the United States and the decision of said supreme court of the State of Minnesota and the said judgment of said supreme court of the State of Minnesota in the above-entitled action were against such title, right, privilege, and immunity.

17th. The judgment of the supreme court of the State of Minnesota rendered in the said above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was claimed by this plaintiff in error in the supreme court of the State of Minnesota in the said above-entitled cause a title, right, privilege,

259 and immunity under a commission held and an authority exercised under the United States and the decision of the said supreme court of the State of Minnesota and the said judgment of the said supreme court of the State of Minnesota were against such title, right, privilege, and immunity.

18th. The judgment of the supreme court of the State of Minnesota rendered in said above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was drawn in question in said above-entitled cause in said supreme court of the State of Minnesota the validity of a statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States and the decision of said supreme court of the State of Minnesota and the said judgment of said supreme court of the State of Minnesota were in favor of the validity of such statute.

THOMAS WILSON,
Attorney for the Winona & St. Peter Railroad Company, Plaintiff in Error.

260 [Endorsed:] 5162. United States Supreme Court. The Winona & St. Peter Railroad Company, plaintiff in error, *vs.* The Town of Elgin, defendant in error. Assignment of errors. Thos. Wilson, attorney for plaintiff in error. Filed Oct. 2, 1888. J. D. Jones, clerk of sup. court, Minn.

Endorsed on cover: Minnesota supreme court. No. 1226. The Winona & St. Peter Railroad Company, plaintiff in error, *vs.* The Town of Elgin. Filed October 8, 1888.

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Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1225.
No. 1226.

The Winona & St. Peter R.R. Co.
PLAINTIFF IN ERROR,
v.
The Town of Plainview,
DEFENDANT IN ERROR.

The Winona & St. Peter R.R. Co.
PLAINTIFF IN ERROR.
v.
The Town of Elgin,
DEFENDANT IN ERROR.

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THE WINONA AND SAINT PETER RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* THE TOWN OF PLAINVIEW, DEFENDANT IN ERROR.	*No.* 1,225.
THE WINONA AND SAINT PETER RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* THE TOWN OF ELGIN, DEFENDANT IN ERROR.	*No.* 1,226.

Now come the town of Plainview and the town of Elgin, defendants in error in the above entitled case, through their undersigned attorneys, and severally move the Court to dismiss the writs of error sued out in these cases, and in case said motion is refused, then the defendants in error move to affirm the judgments of the supreme court of Minnesota.

The ground of the motion to dismiss is that there is no Federal question involved.

The grounds of the motion to affirm are that the writs

were manifestly sued out for delay, and that the questions on which the jurisdiction depends are so frivolous as not to need argument.

The grounds for said motions are more fully stated in the following statement of facts and brief.

These cases involve the same questions and will be submitted by us upon the same brief. They are before the Court on writs of error to the supreme court of Minnesota to review the cases reported at pages 505, 517, 35 Minn. Rep.

Statement.

Ch. 106 of the laws of Minnesota for 1877, after providing for the voting of bonds to railroad companies through an election, provided further (Sec. 7):

"Another mode of arriving at such mutual agreement shall be as follows:

"*First.* Within three months after the filing of any such proposition as is specified in the fourth section of this act with any county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall cause notice to be given, as prescribed in the fifth section of this act, in three public places in each election precinct in the district in which aid is desired, stating that after a day named in said notice, which shall be at least five days after its date, a petition to the proper authorities of such county, town, city or village will be presented to the resident tax-payers of such county, town, city, or village for their signatures, asking such authorities to agree to such proposition; and such petition shall be appended to a substantial copy of such proposition.

"*Second.* If, within four months after the filing of such proposition with any such county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall deliver to such clerk a substantial copy or copies of such proposition so filed, with such pe-

tition to the proper authorities of such county, town, city, or village, asking such authorities to agree to such proposition, appended thereto, bearing the signatures of a majority of the persons residing in such county, town, city, or village, who were assessed for taxes upon real or personal estate, in such county, town, city, or village, as the case may be, as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement for the issue of bonds by such municipality, and of stock by such railroad company, shall be deemed and considered to have been arrived at and perfected; and thereupon such bonds and stock shall be issued and delivered in conformity with the true intent and meaning of such proposition, and with the provisions of this act."

By petition of tax-payers under this section of the law bonds were issued to the Plainview Railroad Company; by the town of Plainview $50,000, by the town of Elgin $40,000.

Before the issuance of the bonds Harrington brought a suit against the town of Plainview and the Plainview Railroad Company to restrain the town from issuing and the railroad company from receiving them. The record in that suit will be found at page 64, fol. 100 *et seq.* of the printed record in Town of Plainview case, and in record of Elgin case p. 24, fol. 39 *et seq.* The lower court defeated Harrington, but on appeal the supreme court of Minnesota decided in his favor, holding Sec. 7, Laws of 1877, above quoted, unconstitutional (*Harrington* v. *Town of Plainview*, 27 Minn., 224). Judgment was thereupon entered restraining the issuance of these bonds, and declaring the bonds void in the hands of the railroad company (*Harrington* v. *Town of Plainview et al.*, 27 Minn., 226; Plainview record, p. 148).

After the decision of the lower court in the Harrington

case, and pending the appeal, the bonds were issued to the Railroad Company and were by it transferred to the Chicago & Northwestern Railroad Company at par in consideration of aid previously furnished by the latter Company toward the construction of the Plainview Company's road; see finding of trial court (Plainview record, p. 149, fol. 209, and Elgin record, p. 129, fol. 178). The Chicago & Northwestern Company sold the bonds on or about July 10, 1879, to one Thomas for 80 cents on the dollar, and during the same July Thomas sold them to Marshall and Illsley, citizens of Wisconsin, for 87 cents on the dollar.

The Plainview Company knew all the facts, obtained the bonds and sold them, intending to deprive the towns of any defence as against *bona fide* holders for value, and Marshall and Illsley bought the bonds without knowledge or notice of any defence except as appears on the face of the bonds and were *bona fide* purchasers for value. (Findings of fact, Plainview record, pp. 149, 150, fol. 209, 210, and Elgin record, pp. 129 and 130, fol. 178, 179.)

Marshall and Illsley sued the towns on certain coupons in the circuit court of the United States for Minnesota. Judgment was rendered in favor of the plaintiffs. The record in this action is printed at p. 24, fol. 44 *et seq.*, Plainview record, and Elgin record, p. 39, fol. 59 *et seq.*, and the opinion of the circuit court at pp. 37, 38, fol. 61–64, Plainview record, and pp. 49–52, fol. 74–78, Elgin record. Though this judgment conclusively settled the liability of the towns to Marshall and Illsley upon the whole $90,000 of bonds and interest coupons, the suit did not involve directly over $5,000, and for that reason this Court dismissed the writ of error brought by the towns to reverse these judgments (*Elgin* v. *Marshall*, 106 U. S., 578).

Marshall and Illsley afterwards brought several suits on other coupons as they matured, in the said circuit court,

and recovered judgments against the towns (p. 151, fol. 212, Plainview case; p. 132, fol. 181, Elgin case).

In 1881 the legislature of Minnesota enacted a certain statute, Ch. 414, Special Laws, 1881, which is as follows (Plainview Record, p. 152, fol. 213; Elgin record, p. 132, fol. 182):

"*Be it enacted by the Legislature of the State of Minnesota:*

213 "SECTION 1. The Winona & Saint Peter Railroad Company is hereby authorized to purchase the stock, or to purchase or lease the property and franchises of the Plainview Railway Company, and said last-named company — hereby authorized to sell and convey or to lease its property and franchises to the said first-named company upon such terms as may be agreed upon by the respective boards of directors of said companies, so as to make the property and franchises of the last-named company a part of the property and franchises of said Winona and Saint Peter Railroad Company, to be used and operated by it under its charter:

"*Provided*, That any such purchase of the property or franchises of the Plainview Railway Company shall be made, and all such property held, by said Winona and Saint Peter Railroad Company subject to all demands, claims, and rights of action against said Plainview Railway Company arising or growing out of the latter company having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin, and Viola to said Plainview Railway Company, and in taking such transfer under this act said purchasing company shall assume all claims and demands against said Plainview Railway Company to the extent and value only of the property and franchises so transferred.

"SEC. 2. The Winona and Saint Peter Railroad Company is hereby authorized to issue its capital stock to an amount necessary to make and complete the purchase aforesaid.

"SEC. 3. This act shall take effect and be in force from and after its passage.

"Approved March 3, 1881."

The Winona & Saint Peter Company accepted this act, and a deed, of date May 11, 1881, was executed to it by the Plainview Company in pursuance of it. (Plainview Record, p. 153, fol. 214; Elgin Record, 134, fol. 184.)

Thereupon the two actions here for review were brought by the towns of Plainview and Elgin against the Winona & Saint Peter Company as the successor of the Plainview Company, and as subject to the liability as to the bonds in question, expressly imposed by said statute, to recover for the unlawful obtaining, appropriation and negotiation of these bonds, originally void, but made valid in the hands of *bona fide* holders by the wrongful obtaining and negotiation of them by the Plainview Company.

Judgments were recovered by the towns upon findings of fact (see page 144, fol. 203 *et seq.*, and p. 158, Plainview Record, p. 124, fol. 172 *et seq.*, and 138, Elgin Record), and the opinion of the highest court of Minnesota in the cases is reported in Town of Plainview *v.* Winona & Saint Peter R.R. Co., and Town of Elgin *v.* Same (36 Minn., Rep., pp. 505 to 517). These judgments are brought to this Court from the highest court of the State for review.

ARGUMENT.

This is a motion to dismiss for want of jurisdiction united with a motion to affirm.

We are confident that we shall establish that this Court has no jurisdiction of these cases. But we insist that if this view is erroneous the judgment should be affirmed.

"When under § 5 of our rule 6 a motion to affirm is

united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument."

Spies *v.* Illinois, 123 U. S., 131, 164, citing Arrowsmith *v.* Harmoning, 118 U. S., 194, 195; Church *v.* Kelsey, 121 U. S., 282.

The assignments of error are found at pp. 188 to 194 of the Plainview record, and p. 167, fol. 248, *et seq.*, Elgin record. Though very voluminous and eighteen in number they may be reduced to two.

First. The judgment of the supreme court of Minnesota denied to the judgment of the United States circuit court in the Marshall and Illsley cases that effect, faith or credit which it was entitled to under the Federal Constitution and acts of Congress.

Second. The judgments of the supreme court of Minnesota violated the obligation of the contract created by the said bonds.

One doctrine has become so elementary in this Court that its elaboration at this time is wholly unnecessary. It is expressed in the opinion of the court in *De Sassure* v. *Gaillard* (127 U. S., 233), as follows:

"It is a well-settled rule, limiting the jurisdiction of this court in such cases, that 'where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one.' (*Klinger* v. *Missouri*, 13 Wall.,

257, 263, per Mr. Justice Bradley.) And it has been repeatedly decided, under § 709 of the Revised Statutes, that to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. (*Brown* v. *Atwell*, 92 U. S., 327; *Citizen's Bank* v. *Board of Liquidation*, 98 U. S., 140; *Chouteau* v. *Gibson*, 111 U. S., 200; *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S., 123; *Detroit City Railway* v. *Guthard*, 114 U. S., 133; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S., 18.")

I.

Do the judgments of the supreme court of Minnesota deny to the plaintiff in error any "title, right, privilege or immunity" held by it under the judgment of the circuit court of the United States in the Marshall and Illsley cases?

A moment's consideration will demonstrate that they do not. The Marshall and Illsley actions were suits by citizens of Wisconsin who held the bonds brought against the towns. The plaintiff in error was not a party, nor was anyone in privity with it a party. Those actions settled *only* that the towns were liable on the bonds to Marshall and Illsley (and of course to purchasers from them). In those actions the railroad company not being a party the circuit court could not, nor did it, settle the rights of the towns and the Plainview Railroad Company with respect to the bonds as between each other. To decide that the bonds were formerly valid in the hands of the railroad company as between it and the towns was wholly beyond the scope of the Marshall and Illsley actions and the jurisdiction of the

circuit court, and the circuit court made no such decision. The circuit court decided in its own language, that "where a decision of the highest judicial tribunal at the time the bonds were issued favors the validity of the law under which they were issued, a subsequent decision impairing their validity will not be followed *to the prejudice of* bona fide *holders*." "These bonds having been purchased by the plaintiffs before the decision in the Harrington case and no previous expression by the Court other than that contained in *State* v. *Town of Highland*, are 'clear obligations to pay' not affected by the last decision." The Court sustained the validity of the bonds on the ground that Marshall and Illsley were *bona fide* holders.

Suppose, for the sake of argument, that the supreme court of Minnesota do not acquiesce in the correctness of the decision of the circuit court. This constitutes no Federal question. Otherwise every case from the State court would be subject to reversal in this Court, because the State court disagreed on the law with the Supreme Court or with some subordinate Federal court. To give this Court jurisdiction the plaintiff in error must have some "title, right, privilege, or immunity" under the decision of the United States circuit court which is denied to it by the State courts in the judgment complained of. (R. S. sec. 709.)

Now the plaintiff in error has no "title, right, privilege or immunity," by virtue of the judgment in the Federal court. Manifestly not, for neither it nor its grantors or assignors were parties to those actions. As to it the judgments in the Marshall and Illsley cases are *res inter alios acta*. Neither the Federal Constitution nor acts of Congress guarantee to every suitor that the same rule of law will be applied to him which would be applied if his citizen-

ship was such that his action might be brought in the Federal court. And the plaintiff in error has no standing here unless he can establish as law the proposition as broadly as we state it.

The case of *Dupasseur* v. *Rochereau* (21 Wall., 130) is decisive of this question. In that case, which is on all fours with this, Sanvé executed to Rochereau a mortgage, and Rochereau in the State court obtained judgment for his debt with a recognition of the special mortgage. He then brought a suit in the same court against Dupasseur, alleging that the latter was in possession of the plantation and asking a foreclosure of his mortgage as against Dupasseur. Dupasseur had purchased the property at marshal's sale under an execution out of the circuit court of the United States, free of the claim of Rochereau, in a suit brought to foreclose a mortgage made by Sanvé to Dupasseur, but in which suit *Rochereau was not a party.* The Louisiana court held that Rochereau's claim was paramount to that of Dupasseur.

This Court says :

" Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this Court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction ; and hence it would be within the judicial power of the United States, as defined by the Constitution ; and it is clearly within the chart of appellate power given to this Court over cases arising in and decided by the State courts.
* * *

"The question then arises, did the supreme court of Louisiana in deciding against the claim of Dupasseur refuse, as the defendant charged, to give proper validity and effect to the judgment of the circuit court of the United States, and decide against such validity and effect?

"The only effect that can be justly claimed for the judgment in the circuit court of the United States is such as would belong to judgments of the State courts rendered under similar circumstances. Dupasseur & Co. were citizens of France, and brought the suit in the circuit court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the State courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances. If, by the laws of the State, a judgment like that rendered by the circuit court would have had a binding effect as against Rochereau if it had been rendered in a State court, then it should have the same effect being rendered by the circuit court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this Court.

"We are bound to inquire, therefore, whether the judgment of the circuit court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a State court. We have examined this question with some care, and have come to the conclusion that it would not.

"The same general rule of law and justice prevails in Louisiana as elsewhere, to the effect that no persons are bound by a judgment or decree except those who are parties to it, and have had an opportunity of presenting their rights. The only apparent exception to this rule in general is the effect of a proceeding *in rem*, which from the necessity of the case is binding on all persons."

The rule deducible from this case is this: Judgments bind only parties to the suit and their privies. Where parties have secured an adjudication in the circuit court of the United States the judgment confers on them, and on them only, certain "titles, rights, privileges, and immunities," which are inviolable in the State courts. But where one is not party or privy to the Federal judgment, it confers on him no "title, right, privilege, or immunity." Even though the State court, in a subsequent suit to which he is a party, should decline to follow the Federal decision, this confers on him no right to have the State decision reviewed in this Court.

All the decisions of this Court are in harmony on this subject. *Green* v. *Van Buskirk* (5 Wall., 307, and 7 Wall., 139) is clearly distinguishable. In that case the New York courts failed to give to the Illinois judgment that faith and credit to which it was entitled. The Illinois judgment was on an attachment, a proceeding *quasi in rem*, and adjudicated that *the property was subject to the attachment*. Green attached the safes in Illinois without notice of the New York chattel mortgage; this gave him, by the Illinois law, the rights of a *bona fide* purchaser of the property (7 Wall., 146, 147). The Illinois judgment was therefore an adjudication upon the title or status of the property itself.

So in *Crapo* v. *Kelly* (16 Wall., 610), the Massachusetts insolvent proceeding passed to the assignee the title to the property itself, which was a right under the Massachusetts judgment. This Court held that the title to this property acquired under the Massachusetts judgment must be respected by the New York courts.

In *Factors' Ins. Co.* v. *Murphy* (111 U. S., 738) the question was similar to that raised in the last case. This Court said (p. 741):

"But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the district court of the United States, to sell the mortgaged property free of encumbrance. Both parties assert rights under this order and sale."

In *Crescent Live Stock Co.* v. *Butchers' Union* (120 U. S., 141), the judgment of the Federal court held violated by the State court was an adjudication on the same subject-matter between the identical parties.

Having before stated that the judgment in United States circuit court in the Marshall and Illsley cases settled only the liability on the bonds of the towns to Marshall and Illsley as *bona fide* holders, let us examine the decision of the supreme court of Minnesota in question to ascertain just what effect it does give to those judgments of the United States circuit court. The court of Minnesota itself says (36 Minn., 512):

"3. Marshall & Illsley, however, brought suit upon the coupons of these bonds as they matured, and recovered thereon in the circuit court of the United States for the district of Minnesota, in a sum less than $5,000, and the bonds have been duly adjudged and determined, in a trial upon the merits in that court, to be valid in their hands.

"For the purposes of this case we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is, in any event, to make the bonds valid negotiable securities held by Marshall & Illsley as *bona fide* purchasers. In other words, it is sufficient to say that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon, and notwithstanding the recitals therein. The result would be the same if that court had differed with this court on questions of fact resting upon evidence *dehors* the bonds, as to their execution or the *bona fides* of their transfer to the present holders.

And the Plainview Company and defendant not having been parties to that action, this plaintiff is not estopped from litigating the questions involved in this case in the State courts. The judgment of the circuit court cannot be reviewed or modified by the State courts; and it is not questioned, as we believe in this case, that the result of the decision and judgment of the circuit court is to fix, irrevocably, the liability of the town for the whole amount of the indebtedness evidenced by the bonds. (*Beloit* v. *Morgan*, 7 Wall., 619.) It must therefore be deemed to have been conclusively settled that the bonds have been transferred to parties in whose hands they have become valid and legal obligations against the plaintiff town."

Thus the State court gives all the effect to the Federal decision which it could possibly have, to wit: as settling conclusively the liability of the towns on the bonds to Marshall & Illsley as *bona fide* purchasers. It is moreover manifest that the plaintiffs' cases depended on sustaining to its fullest extent the Marshall & Illsley judgments as conclusive and unreviewable. It was an essential element of their cases to show their damage, that they had been legally compelled to pay the bonds, by a judgment in favor of *bona fide* holders, conclusive in effect from which they had no escape. For that reason the plaintiff town claimed in these cases, and the State court expressly held that the Federal judgments were valid and conclusive to their fullest extent.

II.

It is equally clear that the decisions of the State court complained of do not violate the obligation of any contract.

It is said by the plaintiff in error that the supreme court of Minnesota in the case of *Town of Highland* (25 Minn., 355) recognized the validity of Sec. 7, Ch. 106, Laws 1877, under which these bonds were issued. That the

bonds were issued on the faith of the Town of Highland decision. That therefore the judgment of the Minnesota supreme court in these cases and in *Harrington* v. *Plainview* (27 Minn., 224) violates the obligation of the contract, giving this Court jurisdiction to review the judgments of the State court.

We do not admit the correctness of these premises; but suppose for the present arguments that they are true. Even if true, there is clearly no jurisdiction on this ground in this Court. No act of the legislative department of Minnesota since the bonds were earned or issued has affected their validity. The constitution under which they were held invalid was in force long before that time. "It is equally clear that the law of the State to which the constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is sought to be impaired." (*Lehigh Water Co.* v. *Easton*, opinion, 121 U. S., 391.) The utmost that the claim of plaintiff in error amounts to (if true) is that the supreme court of Minnesota by its decision before the bonds were issued recognized the law as valid, and after the issue of the bonds declared them void by its decision based on constitutional provisions of the State in force long prior to the making of the contract.

That this Court can take no jurisdiction of these cases on this ground is well settled by the cases of *Lehigh Water Co.* v. *Easton* (121 U. S., 388), and *N. O. Waterworks* v. *La. Sugar Co.* (125 U. S., 18). In the last case this Court said:

"In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The

prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

"This Court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this Court, delivered by Mr. Justice Miller. 'It must be the constitution or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the State court must sustain the law or constitution of the State in the matter in which the conflict is supposed to exist, or the case for this Court does not arise.' (*Railroad Co.* v. *Rock*, 4 Wall., 177, 181.) 'We are not authorized by the Judiciary Act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, where the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held.' (*Knox* v. *Exchange Bank*, 12 Wall., 379, 383.)

"As later decisions have shown, it is not strictly and literally true, that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law.

"In *Williams* v. *Bruffy* (96 U. S., 176, 183), it was said by Mr. Justice Field, delivering judgment: 'Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court' (Rev. Stat., § 709); and it was therefore held

that a statute of the so-called Confederate States, if enforced by one of the States as its law, was within the prohibition of the Constitution.

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the Government, and, whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power (*United States* v. *New Orleans*, 98 U. S., 381, 392; *Meriwether* v. *Garrett*, 102 U. S., 472). Accordingly, where the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this Court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the State (*Murray* v. *Charleston*, 96 U. S., 432, 440; see also *Home Ins. Co.* v. *City Council of Augusta*, 93 U. S., 116).

"But the ordinance now in question involved no exercise of legislative power. The legislature, in the charter granted to the plaintiff, provided that nothing therein should 'be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use.' The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came

within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonable interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city (*Railroad Co.* v. *Ellerman*, 105 U. S., 166, 172; *Day* v. *Green*, 4 Cush., 433, 438). The permission granted by the city council to the defendant company, though put in the form of an ordinance, was in effect but a license and not a by-law of the city, still less a law of the State. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the State, and not at all on any provision of the Constitution or laws of the United States.

"The cases of *New Orleans Waterworks* v. *Rivers* (115 U. S., 674) and *St. Tammany Waterworks* v. *New Orleans Waterworks* (120 U. S., 64), on which the plaintiff relied in support of its bill, were essentially different from the case at bar. In each of those cases, the validity of the article of the constitution of 1879 abolishing monopolies was drawn in question by the bill, and relied on by the defendants. Rivers did not contend that his property was contiguous to the river. The St. Tammany Waterworks Company had been incorporated since the New Orleans Waterworks Company, under a general statute of the State, for the purpose of supplying the whole city and its inhabitants with water. And both those cases were appeals from the circuit court of the United States, upon which this court was not restricted to the consideration of Federal questions decided below, but had jurisdiction to determine the whole case.

"The difference in the extent of the jurisdiction of this court on writ of error to the highest court of a State, and

on appeal from a circuit court of the United States, as affected by the ground of the decision of the court below, is illustrated by the cases of contracts payable in Confederate currency, or made in consideration of loans of Confederate currency, during the war of the Rebellion, and by the cases of promissory notes given before that war for the price of persons sold as slaves.

"In *Thorington* v. *Smith* (8 Wall., 1) this court, reversing a judgment of the circuit court of the United States in Alabama, held that a contract for the payment of money in Confederate currency was not unlawful. Like decisions have often been made in later cases brought here from the circuit courts of the United States (*Planters' Bank* v. *Union Bank*, 16 Wall., 483, 497; *Confederate Note Case*, 19 Wall., 548; *Wilmington & Weldon Railroad* v. *King*, 91 U. S., 3; *Cook* v. *Lillo*, 103 U. S., 792). Yet in *Bethel* v. *Demaret* (10 Wall., 537), where a suit on a mortgage to secure the payment of promissory notes given for a loan of Confederate currency had been dismissed by the supreme court of Louisiana, on the ground that the notes and mortgage were nullities, because the Confederate currency, which constituted the consideration, was illegal by the general law of the State, this court dismissed the writ of error, because no statute of the State was drawn in question. And in *Bank of West Tennessee* v. *Citizens' Bank of Louisiana* (13 Wall., 432; S. C., 14 Wall., 9), where the supreme court of Louisiana, affirming a judgment rendered by an inferior court of the State before the adoption of article 127 of the State constitution of 1868, by which 'all agreements, the consideration of which was Confederate money, notes, or bonds, are null and void, and shall not be enforced by the courts of this State,' dismissed a suit to recover money payable in Confederate notes, basing its judgment both upon that article of the constitution and upon adjudications in that State before its adoption, this court, speaking by Mr. Justice Swayne, dismissed a writ of error, and said: 'The result in this case would have been necessarily the same if the constitution had not contained the provision in question. This brings the case within the authority of *Bethel* v. *Demaret*,'

above cited. In another case at the same term, the disposition by this Court of the case of *Bank of West Tennessee* v. *Citizens' Bank of Louisiana* was thus explained by Mr. Justice Miller: 'As it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control, and was sufficient to supsupport the judgment, because another reason was given which, if it had been the only one, we could review and might reverse.' (*Delmas* v. *Insurance Co.*, 14 Wall., 661, 666.) In *Delmas* v. *Insurance Co.*, just cited, where the judgment of the Louisiana court was put wholly upon that article of the constitution, this court therefore took jurisdiction and reversed the judgment, but said that where a decision of the highest court of a State, 'whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review.' And in *Tarver* v. *Keach* (15 Wall., 67), as well as in *Dugger* v. *Bocock* (104 U. S., 596, 601), the proposition thus stated was affirmed, and was acted on by dismissing a writ of error to a State court. So in *Stevenson* v. *Williams* (19 Wall., 572), where a judgment of the supreme court of Louisiana, annulling a judgment of a lower court, on the ground that the promissory notes on which it was rendered had been given for a loan of Confederate money, was brought here by writ of error, this Court, speaking by Mr. Justice Field, after disposing of a distinct Federal question, and observing that the aforesaid ground would not be deemed in a Federal court sufficient to set aside the judgment, said: 'But the ruling of the State court in these particulars, however erroneous, is not subject to review by us. It presents no Federal question for our examination. It conflicts with no part of the Constitution, laws, or treaties of the United States. Had the State court refused to uphold the judgment because of the provision in the constitution of the State, subsequently adopted, prohibiting the enforcement of contracts founded

upon Confederate money, a Federal question would have been presented. That provision, however, does not appear to have caused the ruling (19 Wall., 576, 577).' Those cases clearly establish that, on a writ of error to a State court, this court had jurisdiction to review and reverse the judgment, if that judgment was based wholly upon the State constitution; but that if it was based on the previous law of the State, this Court had no jurisdiction to review it, although the view taken by the State court was adverse to the view taken by this Court in earlier and later cases coming up from a circuit court of the United States.

"In actions brought upon promissory notes given for the purchase of slaves before the war, the same distinction has been maintained. The constitutions adopted in 1868 by the States of Arkansas, Georgia, and Louisiana respectively, provided that the courts of the State should not enforce any contract for the purchase or sale of slaves. In *Osborn* v. *Nicholson* (13 Wall., 654), a judgment rendered for the defendant by the circuit court of the United States for the district of Arkansas, in an action on a promissory note for the purchase of a slave, was reversed, because this Court was of opinion that the contract was valid at the time when it was made, and therefore its obligation was impaired by the subsequent constitution. For like reasons this Court, in *White* v. *Hart* (13 Wall., 646), reversed a similar judgment rendered by the supreme court of the State of Georgia, and based upon the provision of its constitution. But in *Palmer* v. *Marston* (14 Wall., 10), where the supreme court of Louisiana, in a similar action, had placed its judgment for the defendant upon the law of the State, as established and acted upon before the adoption of the constitution of 1869, and since adhered to, and had declined to pass upon the question whether the provision of that constitution was valid or invalid as an act of legislation, and in relation to the article of the Constitution of the United States against impairing the obligation of contracts, because it was unnecessary and could have no practical influence upon the result, this Court dismissed a writ of error, for want of jurisdiction, saying: 'It thus appears that the provision of the

State constitution upon the subject of slave contracts was in no wise drawn in question. The decision was governed by the settled principles of the jurisprudence of the State. In such cases this Court has no power of review.' 'Substantially the same question arose in *Bank of West Tennessee* v. *Citizens' Bank of Louisiana*, heretofore decided. The writ of error was dismissed for want of jurisdiction. The same disposition must be made in this case.'

"These cases are quite in harmony with the line of cases, beginning before these were decided, in which, on a writ of error upon a judgment of the highest court of a State, giving effect to a statute of the State, drawn in question as affecting the obligation of a previous contract, this Court, exercising its paramount authority of determining whether the statute upheld by the State court did impair the obligation of the previous contract, is not concluded by the opinion of the State court as to the validity or the construction of that contract, even if contained in a statute of the State, but determines for itself what that contract was. Leading cases of that class are *Bridge Proprietors* v. *Hoboken Co.* (1 Wall., 116), in which the State court affirmed the validity of a statute authorizing a railway viaduct to be built across a river, which was drawn in question as impairing the obligation of a contract previously made by the State with the proprietors of a bridge, that no other bridge should be built across the river; and cases in which the State court affirmed the validity of a statute, imposing taxes upon a corporation, and drawn in question as impairing the obligation of a contract in a previous statute exempting it from such taxation. (*State Bank* v. *Knoop*, 16 How., 369; *Ohio Life Ins. & Trust Co.* v. *Debolt*. 16 How., 416; *Mechanics' & Traders' Bank* v. *Debolt*, 18 How., 380; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *New Jersey* v. *Yard*, 95 U. S., 104; *Memphis & Charleston Railroad* v. *Gaines*, 97 U. S., 697, 709; *University* v. *People*, 99 U. S., 309; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S., 244; *Memphis Gas Co.* v. *Shelby County*, 109 U. S., 398; *Vicksburg, &c., Railroad* v. *Dennis*, 116 U. S., 665.) In each of those cases, the State court upheld a right claimed under the later statute, and could not have made the decision that it did

without upholding that right; and thus gave effect to the law of the State drawn in question as impairing the obligation of a contract.

"The distinction between the two classes of cases—those in which the State court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract—as affecting the consideration by this Court on writ of error, of the true construction and effect of the previous contract, is clearly brought out in *Kennebec Railroad* v. *Portland Railroad* (14 Wall., 23.) That was a writ of error to the supreme judicial court of Maine, in which a foreclosure, under a statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. Mr. Justice Miller, in delivering judgment, after stating that it did appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract 'was discussed in the opinion of the Court, and that the Court was of the opinion that the statute did not impair the obligation of the contract,' said: 'If this were all of the case, we should undoubtedly be bound in this Court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract (*Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116). But a full examination of the opinion of the Court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence.

Now, if the State court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the supreme court of Maine was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the State court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the

obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the State court, we cannot take jurisdiction, because we could not reverse the case, though the Federal question was decided erroneously in the court below against the plaintiff in error (*Rector* v. *Ashley*, 6 Wall., 142; *Klinger* v. *Missouri*, 13 Wall., 257; *Steines* v. *Franklin County*, 14 Wall., 15). The writ of error must, therefore, be dismissed for want of jurisdiction' (14 Wall., 25, 26).

"The result of the authorities, applying to cases of contracts the settled rules, that in order to give this Court jurisdiction of a writ of error to a State court a Federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a Federal question and another question were presented to that court and its decision turned on the other question only, this Court has no jurisdiction, may be summed up as follows: When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this Court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this Court has jurisdiction. When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this Court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the State court, and, therefore, its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this Court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the State court gives no effect to the subsequent law, but decides on grounds independent of that law that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this Court has no jurisdiction."

The cases of *Anderson* v. *Santa Anna* (116 U. S., 356), *Douglas County* v. *Pike* (101 U. S., 677), and *Gelpcke* v. *Dubuque* (1 Wall., 175), and the whole line of cases which they represent came up from the circuit court of the United States, and are sufficiently distinguished from these cases in the above quotation from the opinion of this Court in *Waterworks Sugar Co., supra.*

But the assumption upon which the plaintiff in error relies is utterly without foundation in point of fact. It is not true that the alleged contract in question was made after the decision in the *Town of Highland case.* It was made before that decision. That case was decided on January 10, 1879. (See report of case, 25 Minn., 355.) The propositions of the railway company for the bonds in question were presented to the towns on the 31st of January, 1878; the petitions of tax-payers accepting the propositions were filed with the towns on March 28 and 30, 1878, respectively. The resolutions of the boards of supervisors were passed on March 28 and 30, 1878, respectively. (Plainview record, pp. 145–6, fol. 205–207; Elgin record, pp. 125–6, fol. 174–176.) By the propositions the railroad was to be completed during the year 1878, and the road was built according to the proposition (Plainview record, pp. 8, 9, 17), and in the Elgin case the bonds were delivered November 16, 1878. (Elgin record, p. 129.) The contract in question was consummated and closed by the proposition, acceptance and construction of the railroad, and this was all in 1878, before the *Town of Highland* case was decided. (*State* v. *Town of Lime*, 23 Minn., 526–7; *County* v. *Savings Bank*, 92 U. S., 931; *Nugent* v. *Supervisors*, 19 Wall., 214, 247.)

It is therefore clear that the *Railroad Company* acquired no rights whatever under this contract or under the bonds by reason of any supposed recognition of the validity of

the contract in the *Town of Highland case*, decided after the contract was made and after the bonds had been delivered in the Elgin case.

One word upon the *Town of Highland case* itself. It was a mandamus to compel the issuance of bonds to the Midland Railway Company under the act in question. The Court quashed the writ and decided against the bonds without considering the constitutionality of the law. The railroad in that case had been fully built before the company invoked the statute and the Court held (and it was all that it was necessary for it to hold) that aid through the statute could not be invoked as to roads which had been constructed before any steps were taken to obtain town aid under the statute. This was no recognition of the constitutionality of the law. In a much stronger case, because in the prior decision the State court had adjudicated *in favor of the contract in question*, this Court we think settled this point. We refer to *Boyd* v. *Alabama* (94 U. S., 648), where the Court say:

"It is true that in a former case against the same defendant, upon an indictment of a similar kind, for a previous offence of setting up and carrying on a lottery, the supreme court of the State held that the statute in question constituted a contract, and that the repealing act was for that reason void. But in that case the only subject before the Court was the meaning of the statute—whether its provisions in their terms amounted to a contract which a subsequent enactment could not impair. The constitutionality of the act was not drawn in question; that was not denied.

"Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then they will construe the acts presented for consideration, define their meaning, and enforce their provisions.

The fact that acts may in this way have been often before the Court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the Court upon the constitutionality of the acts, because that point might have been raised and determined in the first instance. So when, in the present case, the point was taken for the first time against the constitutionality of the act of 1868, the Court was not precluded by the previous decisions from freely considering and determining it."

Let us, in conclusion, call the attention of the Court to the fact that in the case of *Harrington* v. *Town of Plainview* and the *Plainview Railroad Company* (27 Minn., 224), which has never been brought here for review, the court adjudicated that these bonds were void in the hands of the railroad company. This adjudication, to which both the town of Plainview and the railroad company were parties, estops the company in the case of the town of Plainview to say that the bonds were valid. This decision was prior to the judgments in the Marshall & Illsley cases.

We respectfully submit that the writs of error should be dismissed or the judgments below affirmed.

C. K. DAVIS,
FRANK B. KELLOGG,
AND C. W. BUNN,
Attorneys for Defendants in Error.

FRANK B. KELLOGG AND
C. K. DAVIS,
of Counsel.

Office Supreme Court U. S.
FILED,
FEB 1 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE WINONA AND ST. PETER RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

THE TOWN OF PLAINVIEW, DEFENDANT IN ERROR.

No. 1,225

Notice of Motion to Dismiss or Affirm.

Please take notice that the Town of Plainview, the defendant in error in the above-entitled action, will move the said Court to dismiss the writ of error sued out in the said case, or to affirm the judgment of the Supreme Court of Minnesota therein.

That said motion will be brought up for hearing before the said Court at the Capitol, in the city of Washington, on the 4th day of March, A. D. 1889, at the hour of twelve o'clock, noon, of that day, or as soon thereafter as counsel can be heard.

The grounds of said motion to dismiss or affirm are stated in the motion and brief of argument hereto attached and served with this notice.

Dated this 14th day of January, A. D. 1889.

C. K. DAVIS,
FRANK B. KELLOGG,
C. W. BUNN,
Attorneys for Defendant in Error.

To Thomas Wilson and WILSON & BOWERS,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
FEB 1 1889
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE WINONA AND ST. PETER RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

THE TOWN OF ELGIN. DEFENDANT IN ERROR.

No. 1,226.

Notice of Motion to Dismiss or Affirm.

Please take notice that the Town of Elgin, the defendant in error in the above entitled-action, will move the said Court to dismiss the writ of error sued out in the said case, or to affirm the judgment of the Supreme Court of Minnesota therein.

That said motion will be brought up for hearing before the said Court at the Capitol, in the city of Washington, on the 4th day of March, A. D. 1889, at the hour of twelve o'clock, noon, of that day, or as soon thereafter as counsel can be heard.

The grounds of said motion to dismiss or affirm are stated in the motion and brief of argument hereto attached and served with this notice.

Dated this 14th day of January, A. D. 1889.

C. K. DAVIS,
FRANK B. KELLOGG,
C. W. BUNN,
Attorneys for Defendant in Error.

To WILSON & BOWERS,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error,* vs. THE TOWN OF PLAINVIEW, *Defendant in Error.*	No. 1225.
THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error,* vs. THE TOWN OF ELGIN, *Defendant in Error.*	No. 1226.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS WILSON,
Attorney for Plaintiffs in Error.

HERALD PRINT WINONA, MINN.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE WINONA & ST. PETER RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE TOWN OF PLAINVIEW,
Defendant in Error.
No. 1225.

THE WINONA & ST. PETER RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE TOWN OF ELGIN,
Defendant in Error.
No. 1226.

The two cases above entitled come to this court upon writ of error to the Supreme Court of the State of Minnesota. Defendant in error moves for a dismissal of the writ or an affirmance of the judg-

ment of the Minnesota Supreme Court. As the facts of the two actions are substantially alike, this brief which plaintiff in error submits in opposition to the motion of defendants in error will be made to cover both cases.

STATEMENT.

A more full and accurate statement of facts than is given in defendant in error's brief is necessary for proper presentation of the cases and will promote the Court's convenient use of the records. All references are made to the printed paging of the records.

The actions were brought to recover damages from plaintiff in error for the Plainview Railroad Company's transfer (which is claimed to have been wrongful) of certain railway-aid bonds issued to it by the defendants in error (the towns of Plainview and Elgin.) The ground upon which the plaintiff in error (The Winona and St. Peter Railroad Company) is claimed to be responsible for the Plainview Railroad Company's acts will appear later. The law of Minnesota, providing for and regulating the giving of municipal aid to railroads, prescribed two different modes in which such aid might be obtained. By one method the railroad's proposition for aid was accepted or rejected at an election by vote of the legal voters of the proper district; and according to the other method the municipal acceptance of the railroad's proposition was given by the filing in the proper clerk's office of a petition to the corporate

authorities asking the issue of the desired bonds and signed by a majority of the resident tax-payers of the district. The bonds of defendants in error were issued to the Plainview Railroad Company pursuant to such petition, and not after an election by the legal voters. The parts of the statute necessary to be considered are as follows:

Section 4. Whenever any such railroad company, specified in the first section of this act, shall desire aid in the construction of its railroad from any county, town, city or village specified in said first section, it shall make and deliver to the county auditor of such county, the town clerk of such town, or the clerk of such incorporated city or village, as the case may be, a definite proposition in writing signed by the president and secretary of said railroad company, and sealed with its seal, which proposition shall contain a statement of the amount of bonds desired, the time when payable, and whether payable before maturity at the option of such municipality, the rate of interest which they shall bear, and such proposition shall contain a statement specifying when said bonds are to be delivered with reference to the time of the entire or partial construction of said railroad and may contain a statement that such bonds may be deposited in escrow prior to the delivery to the railroad company; and such proposition shall contain a statement that the said railroad company will in consideration of said bonds, at the election of such municipality, issue to the municipality from which it is to receive the same, such number of the shares of its capital stock as will at par value of such stock correspond with the principal sum of such bonds. In case such bonds are proposed to be deposited in escrow as aforesaid the proposition shall also state that the certificate of the stock to be exchanged therefor shall be placed with the same depository at the same time, and in that case the proposition shall set forth the full name and residence of the trustee or trustees, who shall be the custodian of the stock of said company and of the bonds of such city, village, town or county; the auditor or clerk with whom any such proposition shall be filed shall immediately endorse thereon the date of its re-

ceipt by him, and transcribe the same into the record book of the county, town, city or village, as the case may be, of which he is such clerk.

Section 5. The mode of arriving at such mutual agreement as is hereinbefore specified, shall be as follows:

First—Upon receiving such proposition, the county auditor of such county, the town clerk of such town, or the clerk of such incorporated city or village, as the case may be, shall immediately publish a notice of an election to be held by the legal voters of such county, town, incorporated city or village, at the usual place or places of holding elections therein, and at such time as such clerk may designate, not less than ten (10) days or more than twenty (20) days from the date of such notices, which notice shall contain a substantial statement of the proposition made by said railroad company for the issue of the bonds of such municipality, and shall notify the legal voters thereof to deposit a ballot upon which shall be written or printed the words, "For the railroad proposition," or the words, "Against the railroad proposition." And such notice shall be posted in three public places in each election precinct in the district in which aid is desired, at least seven (7) days before the day of such election, and shall also be published at least twice before such election in one newspaper in such city, village or town, if any is published therein, and if the aid is asked of a county in one newspaper in each village and city in such county in which a newspaper is published, and if there is no newspaper published in such city, village, town or county, then such notice shall be so published in a newspaper published at the nearest place thereto in which one is published.

* * *

Fourth—If a majority of the legal voters who shall vote upon the question at any election to be held in any such county, town, city or village, in pursuance of the provisions of this act, shall, as indicated by the official returns of any such election, vote "for the railroad proposition," then such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company as provided in this act shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds and stock shall be issued and delivered by the proper officer in conformity with the

true intent of such proposition and with the provisions of this act.

* * *

And provided further, that the board of county commissioners of any such county, or the board of supervisors of any such town, or the common council of any such village or city, may, in case it shall deem it for the interest of such county, town, village or city to do so, waive the issuance by such railroad company of any such stock to such county, town, village or city.

Section. 6. No bonds shall be delivered to the company under such proposition until the road, branch or extension thereof for the construction of which the aid has been granted shall have been completed ready for the passage of cars continuously from one terminus through or to the district granting the aid or to the nearest point in its line to such district, or from such terminus to such point as the company in its proposition shall have proposed to construct said road where the line of the road shall not lie through the district.

* * *

Section 7. Another mode of arriving at such mutual agreement shall be as follows:

First—Within three (3) months after the filing of any such proposition as is specified in the fourth (4th) section of this act with any county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall cause notice to be given as prescribed in the fifth (5th) section of this act, in three (3) public places in each election precinct in the district in which aid is desired, stating that after a day named in said notice, which shall be at least five (5) days after its date, a petition to the proper authorities of such county, town, city or village will be presented to the resident tax-payers of such county, town, city or village for their signatures, asking such authorities to agree to such proposition, and such petition shall be appended to a substantial copy of such proposition.

Second—If, within four months after the filing of such proposition with any such county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall deliver to such clerk a substantial copy or copies of such

proposition, so filed with such petition to the proper authorities of such county, town, city or village, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such county, town, city, or village, who were assessed for taxes upon real or personal estate in such county, town, city, or village, as the case may be, as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures; then such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds and stock shall be issued and delivered in conformity with the true intent and meaning of such proposition, and with the provisions of this act.

Minnesota Session Laws of 1877, Ch. 106, Sections 4, 5, 6 and 7; also found in General Statutes of Minnesota of 1878, Ch. 34, Sections 95 to 98.

All the steps required to make the statutory agreement for the issue of bonds were taken; and the railroad was built by the Plainview Company in season and in full compliance with the statute and with the contract under it for issue of the municipalities' bonds. It is stipulated in both cases, and the trial court found:

That the terms and provisions of the statute under which said bonds were issued were in all respects performed and complied with by the said Plainview Railroad Company, and that the proposition submited under said statute was in all respects complied with, and that said Plainview Railroad Company had, prior to the issuance of said bonds, earned and become entitled to the

same, if the law authorizing their issue was constitutional.

Plainview Record, pp. 57, 146; Elgin Record, pp. 67, 126.

The Plainview Railroad Company's proposition had been for the issue of $50,000 of bonds by the Town of Plainview, and of $40,000 of bonds by the Town of Elgin, in return for construction of the entire road and commencement of its operation during the year 1878. (*Plainview Record, pp. 8, 145; Elgin Record, pp. 8, 125.*) And, beside the finding of the trial court just quoted, it is further found as a fact that:

> Said Plainview Railroad Company constructed its railroad and had its cars running thereon and performed the several acts on its part as in said proposition stated, except that the railroad company never issued to the Town of Plainview [or Elgin] any stock of the said company and never tendered or offered to issue the same.

Plainview Record, p. 146; Elgin Record, p. 126.

No stock was given the towns for the reason that the corporate officers, as permitted to do by the statute, had elected not to take, and had waived the issue of, any such stock. (*Plainview Record pp. 11, 146, 148; Elgin Record, pp. 10, 11, 126, 128.*)

After a full compliance as aforesaid on the part of the railroad company the board of supervisors of the said towns respectively adopted resolutions reciting such compliance and authorizing and direct-

ing the issue of the bonds. (*Plainview Record, pages, 9, 10 and 11. Elgin Record, pages, 9, 10 and 11.*)

The bonds of the town of Elgin were issued without dissent by anyone. (*Elgin Record, page 129.*)

There was no dissent on the part of anyone as to the issue of the bonds of the town of Plainview until the Railroad Company had completed its road and in all respects complied with the proposition by it submitted to, and accepted by, the town. (*Plainview Record, Pages 67 and 68.*)

After the Plainview Railroad Company had fully completed its line of Railroad with the cars running thereon in the manner and within the time agreed upon and when the town was about to issue the bonds to the company according to the agreement, an action was brought by one Harrington, a resident and tax-payer of Plainview, against *the town of Plainview and its officers* and the Plainview Railroad Company to restrain the issue of that town's bonds. The claim in that action was that section 7 of chapter 106 of the laws of 1877, quoted heretofore, was unconstitutional, and proceedings and agreements under it therefore void. (*Plainview Record, pp. 67—8, 146, 147; Elgin Record, p. 127.*) The trial court rendered judgment on March 15th, 1879, dismissing the action and dissolving an injunction pendente lite which has been issued. (*Plainview Record, pp. 147-8; Elgin Record, p. 128.*)

In the following September the plaintiff in the action, Harrington, appealed from such judgment to the State Supreme Court, and on October 6th, 1880, that court's decision was made, and on November 16th, 1880, its judgment was given, reversing the judgment of the trial court. (*Plainview Record, pp. 84, 148; Elgin Record, pp. 37-38, 128.*)

After the judgment of the District Court that the bonds might issue, and before any appeal from that judgment, no supersedeas bond having been given, the town officials of Plainview passed a resolution, ("Exhibit D" attached to the complaint) for the issue of the bonds in compliance with the former resolution, ("Exhibin C" attached to the complaint,) accepting the Plainview Railroad Company's proposition. (*See Plainview Record, pp. 9, 11.*) So the Plainview bonds were issued on March 19th, 1879. (*Plainview Record, page 148.*)

A copy of the bonds of each town is given as "Exhibit E" attached to the complaints in these actions. (*Plainview Record, p. 12; Elgin Record, p. 12.*) They refer on their face to the method of their issue in the following language:

> This bond is issued in pursuance of a mutual agreement between the said town and the said railroad company, which agreement was made in accordance with the laws of the State of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor signed by a majority of the resident tax-payers of said town, said agreement having been fully performed by the said railroad company on its part.
>
> This bond is issued in pursuance of the authori-

ty given for that purpose by the State of Minnesota and in compliance with a resolution of the board of supervisors of said town.

The bonds of both towns having thus been acquired by the Plainview Railroad Company, those of Elgin in November, 1878, and those of Plainview in March, 1879, all the bonds were sold and transferred by the Plainview Railroad Company to the Chicago and Northwestern Railway Company in July, 1879, in payment of $90,000 advanced by the latter company for the construction of the former's road. This sum had been furnished by the Chicago and Northwestern Railway Company, a citizen of Illinois, in pursuance of a contract to do so in consideration of a conveyance to it of the Plainview road and of these bonds when issued; and this contract was made in May, 1878. (*Plainview Record, pp. 131, 132; Elgin Record, pp. 111, 112.*) By the Chicago and Northwestern Railway Company the bonds were transferred to one Thomas, a citizen of the State of Wisconsin, and by him they were transferred to Samuel Marshall and Charles F. Illsley, of Milwaukee, Wisconsin. All these transfers were made in July, 1879, and therefore before the Minnesota Supreme Court's decision in the case of Harrington vs. Plainview; and all the transfers were actual sales for value. (*See Plainview Record, p. 149; Elgin Record, pp. 129, 130.*)

Aside from any effect of the recitals of the bonds as notice to their takers of the law under which they

were given and of their issue through petition of taxpayers under section 7 of the statute, instead of election by the qualified voters of the towns, the fact is expressly found:

> That said Chicago and Northwestern Railway Company and said Thomas had due notice and knowledge of all the facts and circumstances preceding and attending the issue and delivery of said bonds to said Plainview Railroad Company, except as to the pendency of the proceedings of the suit so as aforesaid brought by said Harrington.
>
> *Plainview Record, pp. 149, 150; Elgin Record, p. 130.*

Marshall and Illsley, the final recipients of the bonds, had no notice of the proceedings through which the bonds were granted "*except as such appears upon the face of said bonds.*" (*Plainview Record, p. 150; Elgin Record, p. 130.*)

The decision of the Minnesota Supreme Court in rendering the judgments now brought to this court for review was express and positive that "the recitals in the bonds were sufficient to put the purchasers, Marshall and Illsley, or others upon inquiry as respects the authority under which such bonds were entitled to be issued and the manner in which they were in fact issued. As we [the Supreme Court] construe the bond, therefore, all purchasers are chargeable with notice of the invalidity thereof by the recitals."

Plainview Record, p. 182; Elgin Record, p. 160.

The towns refusing to pay the interest upon the bonds, Marshall and Illsley in 1881 and afterward brought several actions against *both towns* upon interest coupons, and the United States Circuit Court for the District of Minnesota, in which Marshall and Illsley brought the actions through their citizenship of Wisconsin, gave judgment against the towns. (*Plainview Record, pp. 39 to 42 inclusive; Elgin Record, pp. 52, 53, 54.*) The grounds of the Circuit Court's decision, though their nature is probably quite immaterial in these actions, may be learned from the opinion of the court as found in *Plainview Record, pp. 35—39; Elgin Record, pp. 47—52.*

The facts as thus far stated compose the case upon which the towns, defendants in error, have claimed in these two actions that the Plainview Railroad became liable to the towns for the amount which the towns themselves have been or will be compelled to pay to holders of the bonds. Such liability of the Plainview Railroad Company is then claimed to be imposed upon this plaintiff in error, The Winona and St. Peter Railroad Company, by the following statute, approved March 3rd, 1881, and referred to in brief of counsel for defendants in error:

An act to authorize the Winona and St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railway Company.

Be it enacted by the Legislature of the State of Minnesota:—

Section 1. The Winona and Saint Peter Rail-

road Company is hereby authorized to purchase the stock or to purchase or lease the property and franchises of the Plainview Railway Company; and said last-named company hereby authorized to sell and convey or to lease its property and franchises to the said first-named company, upon such terms as may be agreed upon by the respective boards of directors of said companies so as to make the property and franchises of the last-named company a part of the property and franchises of said Winona and St. Peter Railroad Company, to be used and operated by it under its charter;

Provided, That any such purchase of the property or franchises of the Plainview Railway Company shall be made, and all such property held, by said Winona and Saint Peter Railroad Company, subject to all demands, claims and rights of action against said Plainview Railway Company, arising or growing out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin and Viola, to said Plainview Railway Company, and in taking such transfer under this act said purchasing company shall assume all claims and demands against said Plainview Railway Company, to the extent and value only of the property and franchises so transferred.

Section 2. The Winona & St. Peter Railroad Company is hereby authorized to issue its capital stock to an amount necessary to make and complete the purchase aforesaid.

Special Laws of Minnesota for 1881, Ch. 414.

Plainview Record, p. 152; Elgin Record, p. 132.

On May 11th, 1881, The Winona and St. Peter Railroad Company bought, and received a deed of, the franchises and property of the Plainview Railroad Company. This purchase was made by virtue of the statute just quoted, and the property obtained by plaintiff in error is found to have been of the val-

ue of $225,000. (*Plainview Record, pp. 153—154, Elgin Record, pp. 133—134.*)

The findings of the District Court in these actions are contained in *Plainview Record, pp. 144—155*, and in *Elgin Record, pp. 124—136.*

The opinion and decision of the Supreme Court of Minnesota are given in *Plainview Record, pp. 179—186*, and in *Elgin Record, pp. 157—164.* The case of *Harrington vs. Town of Plainview et al.* is reported in *27 Minn., 224.* The report of *Marshall et al. vs. Town of Plainview* will be found in *8 Fed. Rep., 783; S. C., 3 McCrary, 35.* And these cases are reported below in *36 Minn. 505 and 517.*

ERRORS ASSIGNED.

The full assignment of errors will be found in the *Plainview Record, pages 188—194; Elgin Record, pages 167—172.* Generally stated these federal questions are:

(1.) Did the Supreme Court of Minnesota in rendering its judgments in these cases fail to give to the judgments of the United States Circuit Court in the Marshall & Illsley cases such faith and credit as they were entitled to under the constitution and laws of the United States?

(2.) Did it in rendering these judgments disregard the provisions of the constitution of the United States that no state shall pass any laws impairing the obligation of a contract?

BRIEF.

The Supreme Court of Minnesota having decided adversely to the plaintiff in error these questions, we shall attempt to show that this was error which this court has jurisdiction to review and correct. We shall consider these questions in the order above stated, but preliminarily we ask attention to a few propositions that we think will make more clear the answer.

First.

1. The law of Minnesota providing for the bonding of towns and counties in aid of the construction of railroads, as we have seen, only authorized the issue of the bonds upon a mutual agreement entered into by and between the railroad company to which they were to be issued and the municipality issuing them. The law expressly provided that "the mode of arriving at such mutual agreement" should be by the presentation of a "proposition" by the railroad company to be accepted by the municipality in one of two ways, namely: (1) By a vote of the electors, or (2) by a petition of the tax-payers. We beg leave here to again call attention to the language of the recitals on the face of the bonds:

> This bond is issued in pursuance of a mutual agreement between the said town and the said railroad company, which agreement was made in accordance with the laws of the State of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town (*upon a petition therefor signed by a majority of the resident tax-payers of said town*) said agreement hav-

ing been fully performed by the said railroad company on its part.

This bond is issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of said town.

It will be seen that all of the above recital down to that part enclosed in parentheses is merely of such facts, or legal conclusions, as every one dealing in the bonds was bound at his peril to take notice of, for

Even a bona fide holder for value without notice before maturity of a municipal bond is bound to show legislative authority in the issuing body to create the bond.

Hayes vs. Holly Springs, 114 U. S. 126.

No bond could be legally issued except upon a proposition accepted by the town. As to that no recital was needed. But the statute having provided that the proposition must be accepted in one of two ways, that part of the recital enclosed in parentheses shows most conclusively in which one of these ways it was accepted, i. e. "*upon a petition therefor signed by the tax-payers.*" If that was unconstitutional, therefore, everyone taking the bonds had notice of that fact and stood simply in the shoes of the Plainview Company having just such rights as it had—no more, no less.

Though this proposition is hardly open to discussion, I may be pardoned for referring to a few authorities in support of it.

In *Angle vs. N. W. Mut. Life Ins. Co., 92 U. S. 341*, this court thus states the rule:

Even the holders of negotiable securities taken in the usual course of business, before the securities fall due, are held chargeable with notice, where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect. (*p. 341.*)

* * *

If he chooses to receive it under such circumstanstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. (*ib., p. 342.*)

* * *

Actual notice in such case is not required, even in suits founded on negotiable securities where the evidence of its infirmity consists of matters apparent on its face.

* * *

Constructive notice in such case is held sufficient, upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of others, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry in such a case is sufficient notice in equity where the means of knowledge are at hand, and if the party, under such circumstances, omits to inquire, and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained. (*ib., p. 342.*)

If the recitals in such a bond are such as to put the endorsee or purchaser upon inquiry and by a diligent prosecution of that inquiry he could ascertain the defects, he will be held to have notice of them, and he cannot enforce the payment of the bonds.

Harshman vs. Bates County, 92 U. S. 569, 575.

County of Bates vs. Winters, 97 U. S. 83, 91.

School District vs. Stone, 106 U. S. 186, 187.

Liebman vs. City of San Francisco, 24 Fed. Rep. 711.

Every dealer in municipal bonds which upon their face refer to the Statute upon which they were issued is bound to take notice of the Statute and of all its requirements.

McClure vs. Township of Oxford, 94 U. S. 429, 432—3.

Everyone taking these bonds therefore had notice of the antecedent steps and held them subject to any defense that would have been good against the original payee.

2. Until the decision of the Supreme Court of Minnesota in Harrington's case, above referred to, there had not been a doubt expressed by the courts of the State of Minnesota, (*See decision of U. S. Circuit Court in Marshall and Illsley's case, Plainview Record, page 37*), nor, as it is believed, in the courts of any other State or by any of the Federal courts, but that such a conditional law as that under which these bonds were issued is constitutional and valid.

Grant vs. Courter, 24 Barbour, 232.

Town of Duanesburgh vs. Jenkins, 57 N. Y. 177.

Williams vs. Duanesburgh, 66 N. Y. 140, 141.

Town of Bennington vs. Park et al., 50 Vt. 178.

Stein vs. Mayor, 24 Ala. 591.

Lane vs. Schomp, 20 N. Jer. Eq. 82.

Pompton vs. Cooper Union, 101 U. S. 196.

Orleans vs. Platt, 99 U. S. 676, 680.

Thompson vs. Perrine, 103 U. S. 806.

Draper vs. Springport, 104 U. S. 501.

Bernard Township vs. Stebbins, 109 U. S. 341.

See also the following cases that cannot be distinguished from this on principle:

C. W. & Z. R. R. Co. vs. Comr's. of Clinton Co., 1 Ohio St. Rep. 77.

City of Fort Worth vs. Davis, 57 Tex. 226.

Dwyer vs. Hackwith, 57 Tex. 245.

City of St. Louis vs. Alexander, 23 Mo. 483, 513, 520.

Blanding vs. Burr, 13 Cal. 358.

Hobart vs. Supervisors, 17 Cal. 24, 32, 35, 36.

Slack vs. Mayville &c. R. R. Co., 13 B. Monroe, 1.

Lock's Appeal, 72 Pa. St. R. 491.

The State vs. Parker, 26 Vt. 357.

State ex rel. Dom. vs. Wilcox, 45 Mo. 458, 462—3.

Lafayette R. R. Co. vs. Greger, 34 Ind. 185, 220 et seq.

Petty et al. vs. Myers, 49 Ind. 1.

People vs. Reynolds, 5 Gilman (Ill.) 1.

Last case referred to and affirmed in

People vs. Solomon, 51 Ills. 37, 53.

Bullock vs. Curry etc., 2 Met. (Ky.) 172.

People vs. Association of Philadelphia, 92 N. Y. 311.

And no Court had more emphatically declared such statutes to be valid than the Minnesota Supreme Court up to the decision in Harrington's case, which was after these bonds had been earned and issued and transferred by the Plainview Railroad Company. See

Davidson vs. Ramsey County, 18 Minn. 482.

Guilder vs. Town of Otsego, 20 Minn. 74.

Guilder vs. Town of Dayton, 22 Minn. 366.

State ex rel. vs. Town of Highland, 25 Minn. 355.

There was therefore when these bonds were earned and transferred by the Plainview Railroad Company absolutely nothing to cause the most prudent, honest and intelligent man to entertain a doubt as to the constitutionality of the law under which they were issued or the right in law and in morals to transfer them, or to suspect that such transfer could in any manner prejudice anyone. The Supreme Court of Minnesota could not fail to find and

decide, as it did, that "there was no actual fraud in the procurement and transfer of the bonds."

Plainview Record, page 181.

If there has been any fraud or even sharp practice, the record shows that the Plainview Railroad Company has been the victim. These cases therefore fall clearly within the rule so often laid down by this Court and followed by the U. S. Circuit Court in the Marshall and Illsley cases—that the rights of parties to such contracts are under such circumstanstances to be determined according to the law as it was interpreted and understood when the contracts were made and executed.

3. From the premises we contend that it follows as an indisputable legal conclusion that the transfer of these bonds by the Plainview Railroad Company, under such circumstances, could not make it liable for damages—that no legal damages could possibly follow therefrom.

McClure vs. Township of Oxford, 94 U. S. 429, 433.

Otis vs. Cullum, 92 U. S. 447.

Clancy vs. McEmery, 17 Wis. 177.

It would be a reproach to any Court to even suggest that it might hold that a transfer without fraud or warranty of bonds honestly and fairly obtained for a valuable consideration in strict pursuance of both the letter and spirit of an enabling stat-

ute uniformly theretofore held to be constitutional and valid, and when such transfer was made to parties with notice and who legally stood in no better position to enforce the payment of such bonds than the original payees, could give a right of action against such payee for damages.

The damage held to have resulted to these plaintiff towns could only be predicated, as we shall hereafter show that the Supreme Court of Minnesota did predicate it, on the alleged erroneousness of the judgments of the U. S. Circuit Court in Marshall and Illsley's cases above referred to.

Let us see just what the Minnesota Supreme Court determined and made the basis of its decision against the plaintiff in error. This will appear from both the record in the strict technical sense in which that word is used in the law, and from the opinion of the State Supreme Court, which is a part of the record here.

(*a*) By the statute of Minnesota all opinions of the Supreme Court are required to be in writing and filed with the clerk, and so become a part of the records of that Court. General Statutes of Minnesota of 1878, Ch. *63*, Section 3, reads as follows:

Section 3. *Decisions to be in writing—entry of judgments.* The said Court shall, in all cases decided by it, give its decision in writing, which shall be filed by the clerk of said Court with the other papers in the case. Decisions in cases heard at a general term may be filed in vacation, and judgment entered thereon in pursuance oi the finding and order of the Court,

with the same effect as upon decisions made and filed in term.

According to many decisions of this court, the written decision of the State Court is a part of the record here when such statutes as the preceding exist. See

Gross vs. U S. Mortgage Co., 108 U. S. 477, on pp. 484—487.

Adams County vs. Burlington & Missouri R. R. Co., 112 U. S. 123, 129.

Detroit City Ry. Co., vs. Guthard, 114 U. S. 133, 137.

Jacks vs. Helena, 115 U. S. 288.

Phila. Fire Association vs. New York, 119 U. S. 110, 116.

Palmer vs. Hussey, 119 U. S. 96, 98.

Kreiger vs. Shelby R. R. Co., 125 U. S. 39, 44.

(*b*) Also, the syllabus and opinion are certified by the clerk of the State Supreme Court as a part of the record which he returns under the writ of error. (*Plainview Record, p. 186; Elgin Record, p. 164.*) Not only are they included in the record preceding the clerk's certificate; but the clerk further expressly declares them to be a part of that record. Such certification is enough in itself, even where the state statutes do not make the opinion and decision a part of the record.

(*c*) No longer, as under the 25th section of the Ju-

diciary Act, must the error appear "upon the face of the record." In reference to the omission of this requirement from the Act of 1867, this Court has said:

> It is probable that in determining whether one of those questions was actually raised and decided in the State Court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry to the face of the record. What was the record of a case was pretty well understood as a common law phrase at the time that statute was enacted. But the statutes of the states and new modes of proceedings in those courts have changed and confused the matter very much since that time.
>
> It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana. And though we have repeatedly decided that the opinions of other State Courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question.

Murdock vs. City of Memphis, 20 Wall. 590, 633.

And this language stands approved, and the rule is established, that "in the existing state of the law it is our [this court's] duty to examine the opinion * * * in connection with other portions of the record," for the purpose of ascertaining whether a federal question is presented.

Gross vs. U. S. Mortgage Co., 112 U. S. 477, 484—6.

Phila. Fire Association vs. New York, 119, U. S. 110, 116.

Palmer vs. Hussey, 119 U. S. 96, 98.

Renaud vs. Abbott, 116 U. S. 277, 285.

In the light of its written opinion and decision and of the "record" then, what did the Minnesota Supreme Court found its judgment upon? The opinion will be found on pp. 180-186 of the Plainview Record. The *first essential* was the decision that the bonds were invalid by reason of the unconstitutionality of the law under which they were issued. Adding nothing to the cases already cited upon the merits of that point, and admitting for present purposes the propriety of the decision that the law under which the bonds were issued was unconstitutional and that the bonds were invalid, still the liability of the Plainview Railroad Company, and therefore of plaintiff in error, to the towns would not result from such fact alone. The *second essential* of the state court's decision plainly was that, though the bonds were invalid and though they contained such recitals as charged all takers with notice of their invalidity, yet the Circuit Court of the United States had erroneously made the towns liable upon the bonds by its judgments and for the consequences of such judgments the Plainview Railroad Company, and therefore plaintiff in error, was responsible.

The Minnesota Supreme Court expressly decided

that the recitals of the bonds were such as put all takers, including of course Marshall and Illsley,

> Upon inquiry as respects the authority under which such bonds were entitled to be issued and the manner in which they were in fact issued. *As we [the court] construe the bonds therefore*, all purchasers are chargeable with notice of the invalidity thereof by the recitals. (*Plainview Record, p. 182.*)

Consequently according to the State Court's decision, and as we have seen according to the clearly settled law, neither the Chicago and Northwestern Railway Company, nor Thomas, nor Marshall and Illsley, could enforce the bonds against the towns unless the Plainview Railroad Company itself could.

And, if the transfer of the bonds created no new or different rights against the towns, and did not make a bad bond good in favor of the transferees, it of course could not possibly be said that the Plainview Railroad Company was liable for its transfer of the bonds to persons who had notice of their invalidity and stood merely in its shoes.

When the State Court had once determined that the transferees of the bonds had no better legal position than the Plainview Railroad Company itself, the conclusion would have necessarily followed, if there had been no judgments of the United States Circuit Court in existence, that the transfer of the bonds had had no legal effect whatever, and a judgment would plainly have been necessitated that the towns had no cause of action for such transfer. It was the judgments of the United States Circuit Court in the Marshall and Illsley suits, and they alone,

which could further be thought of as a possible ground for liability of plaintiff in error; and it was those judgments and their consequences which the State Court in fact made the foundation of the judgments now brought here for review. The position taken by the State Court was that because the Circuit Court had rendered judgments against the towns, and so compelled them to pay the bonds, the Plainview Railroad Company was liable for such result even though, according to the opinion and decision of the State Court itself, the Circuit Court's decision was wrong and the bonds were legally invalid in the hands of Marshall and Illsley as much as before any transfer. In other words, the decision of the State Supreme Court was that if the Circuit Court had not rendered the judgments, which it did against the towns, the plaintiff in error could not have been adjudged liable; but, though the Plainview Railroad Company's transfer of the bonds had not altered the legal situation and was not in itself a ground of liability, yet the Circuit Court judgments *had* altered the legal situation and plaintiff in error was responsible for the effects of those judgments.

The language of the court below makes the ground of its decision clear. Indeed after holding that the transferee of these bonds could stand in no better position than the transferor because of the effect of the recitals, no other ground could possibly be taken by the court than that the Circuit Court judgments, had been erroneous and that the Plain-

view Railroad Company, and so plaintiff in error, was responsible for the deleterious results of the Circuit Court's error. We need hardly have taken so much trouble to prove that this is the ground the court did take, for the court itself emphasized that fact. There are five judges on the bench. One dissented from the decision in toto. Mr. Justice Vanderburgh delivered an opinion to which Mr. Justice Berry assented. The Chief Justice and Mr. Justice Dickinson joined in an opinion in which they expressly declared that they based the responsibility of the Plainview Company on the grounds therein stated.

The following quotations are worth making from the opinion of Justice Vanderburgh:

> Marshall and Illsley, however, brought suit upon the coupons of these bonds as they matured, and recovered thereon in the Circuit Court of the United States for the district of Minnesota in a sum less than $5,000, and the bonds have been duly adjudged and determined in a trial upon the merits in that court to be valid in their hands. For the purposes of this case, we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is in any event to make the bonds valid, negotiable securities held by Marshall and Illsley as *bona fide* purchasers.
>
> In other words, it is sufficient to say *that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon and notwithstanding the recitals therein.*
>
> *Plainview Record, p. 182.*

The last of these words directly declare that if the Marshall and Illsley cases had been brought in the Minnesota Supreme Court, it would have decided

differently from the United States Court, and in favor of the towns. If so, how could the State Court adjudge plaintiff in error liable for the transfer of the bonds *unless it held plaintiff in error liable for the reason that the United States Court had made a wrong decision?*

The opinion rendered by the Chief Justice and Justice Dickinson is not less direct and unmistakable in placing the decision that the plaintiff in error is liable in these actions upon the ground that the Circuit Court judgments erroneously imposed an actual liability upon the towns. We beg leave to quote here the full opinion, as it is brief and specific:

> We concur in the conclusion expressed in the foregoing opinion, but we would base the responsibility of the Plainview Company distinctly upon the following considerations:
>
> That company having procured the unauthorized execution and delivery to itself of these bonds, in form expressing the obligation of the town and having negotiated the same, *so that they have thus come into the hands of parties who have enforced a recovery upon them by proper action in a competent tribunal*, the corporation is answerable for its own unauthorized acts which have resulted in this injury to the town, unless this consequence—*the recovery upon the bonds*—is to be deemed too remote to afford a ground of legal liability. As respects the acts of the Plainview Company this injurious consequence is not remote, but proximate. *The damage suffered by the towns consists in its being compelled* to *pay these bonds;* but that is just what the Plainview Company must be deemed to have contemplated when it negotiated for, procured, and disposed of the bonds. No other purpose or object can be ascribed to it than that, either in its own hands or in the hands of future holders, the bonds should be paid by the town, voluntarily or by legal compulsion. One

charged with responsibility for his own acts resulting in injury to another should not be heard to say that the injurious consequence is too remote to subject him to liability if he actually contemplated that consequence, although others might not have anticipated such a result. *That the judgment by which the liability of the town to pay the bonds has been conclusively established was erroneous* does not make remote the damage thus resulting to the town, if this result—the enforcement of the bonds—was within the purpose of the company when it procured and negotiated them as obligations of the town. *It is argued that the company could not have anticipated an erroneous decision and should not be held liable for the consequences of such a decision.* Probably it did not anticipate or suppose that an adjudication holding the town obligated to pay the bonds would be erroneously made, for it may have supposed the bonds to be valid and rightfully enforceable; but *the fact that it did not suppose that such an adjudication would be erroneous* does not make remote the damage complained of. It is proximate, and liability follows because the company procured and negotiated these unauthorized securities as the obligations of the town, to be enforced as such, *and because they have been so enforced* in a court having jurisdiction, as the corporation anticipated they would be.

Plainview Record, p. 185.

The corporation (the Plainview Railroad Company) they say is answerable for its own unauthorized acts which have resulted in injury to the plaintiff towns "unless this consequence—*the recovery upon the bonds*—is to be deemed too remote to afford a ground of legal liability."

They then declare that the recovery upon the bonds (i. e. the judgment of the United States Circuit Court) is not too remote, to afford a ground of legal liability, but on the contrary that it does afford such ground of liability. They add: "The damage

suffered by the towns consists in being compelled to pay these bonds * * * *That the judgment, by which the liability of the towns to pay the bonds has been conclusively established, was erroneous does not make remote the damages thus resulting to the town.*" And farther they say: "The liability follows because the company procured and negotiated these unauthorized securities as the liabilities of the town to be enforced as such *and because they have been so enforced.*" That is, the court holds that because the judgments of the U. S. Circuit Court have been rendered and executed, therefore the plaintiff in error is liable. These opinions show—what would be clear even if the reasons or grounds of the decision were not stated—that the Minnesota Supreme Court held that but for the alleged erroneousness of the judgments of the Circuit Court of the United States this defendant in error or its grantor, the Plainview Railroad Company, could not be held liable, and that because of such alleged error they are liable.

Or, otherwise stated, the Minnesota Supreme Court has held that these federal judgments did not simply *declare* a liability that existed without and before them; but that they *created* the liability—which but for the judgments did not exist.

Such were the actual grounds of decision of these cases below; and such, as soon as it was determined that the transferees of the bonds stood in no better

position than the transferors, was the only possible ground of such decision.

Secondly.

It will now be considered whether the correctness of these decisions of the Minnesota Supreme Court presents a federal question, and if so whether the decisions were right or wrong.

(1.) It is settled on principle and by the express adjudications of this Court that due effect is not given to the judgments of federal courts sitting in a particular state unless they are accorded such effect as would in a like case, under similar circumstances, be accorded to the judgments of the State Courts of equal authority in such State; and the question whether a State Court has given such effect to any such judgment is a question arising under the constitution and laws of the United States and falls within the jurisdiction of this court.

Crescent Live Stock Co. vs. Butcher's Union, 120 U. S. 146—147.

Embry vs. Palmer, 107 U. S. 9—10.

Dupasseur vs. Rochereau, 21 Wal. 134—135.

The opinion of the court in Marshall and Illsley's cases will be found on pages 35 to 39 inclusive, and the judgment on pages 39 to 42 inclusive, of the Plainview Record.

The court in those cases stated that the only matters relied on as a defense were, (1) that Section 7, Chapter 106 of the laws of Minnesota was unconstitutional and void, and (2) that the decision of the Supreme Court of Minnesota in Harrington's case (referred to above) was conclusive and binding on the federal courts, And having decided the second defense in the negative, it held that it was unnecessary to consider the first, for the reason that inasmuch as that section of the law under which the bonds were issued had been construed by the courts to be valid and constitutional when the contract was made and until after the bonds were earned and issued, the rights of the parties were to be governed by such construction and could not be affected or taken away by any subsequent change of decision. The court accordingly rendered judgment against the defendant towns. The question is therefore sharply presented:

Did the Supreme Court of Minnesota in these cases give to the judgments of the U. S. Circuit Court in Marshall and Illsley's cases such force and effect as it would have allowed them had they been rendered by it?

If not, then as has been seen it did not accord them such credit and effect as under the constitution and laws of the United States it should.

This question hardly admits of discussion. It would hardly be respectful to the Supreme Court of Minnesota or to any intelligent court to suppose

that it might render judgment in favor of one for damages alleged to have resulted to him from its judgment obtained against him without fraud and after a fair trial. That no such action will lie is one of the questions long since settled—if indeed it can be said to have ever been an open one. A hundred years ago Chief Justice Eyre, delivering the opinion of the Court of Common Pleas in England in case of *Phillips vs. Hunter, 2 H. Blacks. 414*, manifestly surprised that anyone could make such a claim, said:

> Shall the same judgment create a duty for the recovery upon which he may have an action of debt and a duty against him upon which an action will lie? This goes beyond my comprehension.

See also the opinion of Chief Justice Kent in

Smith vs. Lewis, 3 John. R. 168,

where he uses language that so well fits this case that I quote briefly:

> This suit is an attempt to overhaul the merits of the verdict aud recovery in Connecticut. The defendant below recovered damages of the plaintiff, in that State, on a charge of fraud, in the sale of Virginia lands; and the plaintiff now alleges that there was no such fraud, and that the testimony which was produced, in support of the charge, was procured by the corrupt acts of the defendant. If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. The injustice of the recovery appears to be the real *gravamen*. The declaration does, in substance, tell the defendant that he had obtained a verdict and judgment against the plaintiff, which he ought not to have done, whereby the plaintiff is injured and claims a return of the money so unjustly recovered.

He added that to permit such a recovery would be against public policy and convenience, productive

of endless litigation and contrary to established precedent.

I think it may safely be asserted that no authority to the contrary can be found. The maxim *executio juris non habet injuriam* is of universal application in such cases. In these cases the Supreme Court of Minnesota has assumed not only to disregard but practically to reverse the judgments of a court of equal dignity and jurisdiction. While it has not in so many words said that it reverses those judgments, it has attempted that which is equivalent—held them erroneous and ordered the repayment of the money collected on them.

Unless counsel for the plaintiff in error is mistaken in both his premises and conclusion, therefore, the judgment of the State Supreme Court in the respects complained of above was a direct violation of the constitution and laws of the United States and of the legal rights of this plaintiff in error.

(2) To break the force of this conclusion the counsel for defendants in error are understood to argue that the state courts are not bound to give full faith and credit, or any faith and credit, to judgments of the federal courts except in a suit and between parties where such judgments would operate as a technical estoppel. It would be a sufficient answer to this to say that it is in the teeth of the doctrine established by the cases above referred to. No authority is cited that seems to support this contention, nor

does it appear to have any foundation in reason. It needs no argument to show that if *equal faith and credit in all respects* are not accorded to the judgments of the United States Circuit Courts with the judgments of the Supreme Courts in the States in which such judgments are rendered, the jurisdiction of such federal courts will operate as a snare, the courts themselves being shorn of their jurisdiction and dignity, and their judgments will fail to command the respect due to the judgments of every court acting within its legitimate sphere. Full force and effect is not claimed or allowed to the federal judgments because they operate technically by way of estoppel, but because no other court of merely concurrent jurisdiction can be allowed to question their correctness, much less to deny or to in the least impair their effect or operation. So much logically and necessarily follows from the fact that the federal courts are of equal dignity and concurrent jurisdiction with the state courts.

This Court has in well-considered language answered this contention. Speaking of the federal courts, it says:

> Their judgment or decree when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely con current jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be

carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate.

Crescent Live Stock Co. vs. Butcher's Union, 120 U. S. 141, 157.

The learned counsel of the defendants in error rely on the case of *Dupasseur vs. Rochereau, 21 Wall., 130,* which they claim is on all fours with this case and decisive of this question.

If I have intelligently read that case, all it decides is that, inasmuch as the judgment of the United States Circuit Court relied on by Dupasseur as a defense did not touch or affect the rights of either party or any question involved in that suit, the State Court acted properly in not regarding it. It does not appear to have the least application to the question to which it is cited.

See on this point

Green vs. Van Buskirk, 5 Wal. 307; S. C. 7 Wal. 139.

Crapo vs. Kelly, 16 Wall., 610, 621.

Embry vs. Palmer, 107 U. S. 3.

Crescent Live Stock Co. vs. Butcher's Union, 120 U. S. 141.

(3). It is also suggested by counsel for defendant in error that the U. S. Circuit Court sustained the validity of the bonds on the ground that Marshall and Illsley were bona fide holders without no-

tice. While it is perhaps true that, even if the fact were found to be so, it could not lessen or vary the effect which should be given to those judgments in these cases, yet the attention of the court is asked to the fact that there is not the least basis for such claim or suggestion. As has been shown (supra, p. p. 16–18) the court could not have so found with out utterly disregarding both the facts and the law.

And if this court will take the trouble to consult its own records in those cases when in this court on writ of error (No. 804. Oct. Term, 1882) it will be seen that even the attorneys of Marshall and Illsley did not claim or pretend that they were holders without notice. *Brief of S. U. Pinney, attorney for Marshall and Illsley, pages 1 and 2.* The opinion of the court too in those cases shows very clearly the ground of the decision.

After stating the only grounds of defense set up by these towns, viz. (1) that Section 7 of the enabling Statute under which the bonds were issued was unconstitutional and void, and (*2*) that the decision of the Minnesota Supreme Court in Harrington's case was conclusive on the federal courts, the U. S. Circuit Court held that it was not necessary to consider the first defense in the form in which it was stated as the liability of the municipality issuing such bonds is determined by the construction placed on the enabling statute by the State Courts at the time when the contract is entered into and the bonds earned and issued, and not by the construction given

to it by such courts at the time suit is brought to enforce payment of the bonds. And having found that when these bonds were earned and issued the validity of the law authorizing their issue was recognized by the Supreme Court of Minnesota, the U. S. Circuit Court held that the plaintiffs were entitled to recover. In delivering the opinion the court used this language:

> It is insisted that this decision of the highest court of the State is binding and the defendants entitled to judgment. Such is not my opinion. The Federal Courts, it is true, generally follow the adjudications of the highest courts of the State in the construction of its statutes, but exceptions are recognized, and these cases fall within the rule laid down in *The City vs. Lamson, 9 Wall. 477,* which is, briefly, where a decision of the highest judicial tribunal at the time the bonds issued favors the validity of the law under which they were issued a subsequent decision impairing their validity will not be followed to the prejudice of bona fide holders.
>
> To the same effect, *Douglas vs. Pike Co., 101 U. S. 687.* We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

This is familiar doctrine. The Chief Justice in delivering the opinion of this court in the last cited case laid it down in these words:

> The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retrospective.
>
> * * *
>
> We cannot give them [judgments of State Courts]

a retrospective effect without impairing the obligation of contracts, long before entered into. This we feel ourselves prohibited by the constitution of the United States from doing.

And Mr. Justice Strong, delivering the opinion of this court in *Olcott vs. The Supervisors, 16 Wall. 690,* stated the rule as follows:

> This court has always ruled that if a contract, when made, was valid under the constitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, as they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule.

See also

Taylor vs. Ypsilanti, 105 U. S. 60, 70, 72.

Ohio Life and Trust Co. vs. Debolt, 16 How. 432.

Anderson vs. Santa Anna, 116 U. S. 356.

Township of Pine Grove vs. Tolcott, 19 Wal. 666, 677—8.

This doctrine is not peculiar to the Federal Courts. See

Williams vs. Duanesbury, 66 N. Y. 141—142.

Commr's vs. King, 13 Fla. 451.

Harris vs. Jex, 55 N. Y. 421, 424.

Nor is it limited in its application to endorsees of such securities without notice. In Taylor vs. Ypsi-

lanti, above cited, the plaintiff purchased the bonds from the railroad company, which had earned them, after the decision of the State Supreme Court holding the law under which they were issued unconstitutional. He therefore stood, as to any defense to such bonds, in the shoes of his grantor, the railroad company. Any defense that would have been good against it, would also have been good against him. The court deciding the suit said:

> The present case then appears to be this: testing the rights and obligations of the parties by the law of the state, as declared by this court and as declared and acted upon by all the departments of the state government at and before the time when the railroad company entered upon the execution of the contract with the city, we should be obliged to reverse the judgment of the court below [i. e., hold the bonds valid]; whereas, if we accept the decision of the Supreme Court of Michigan, made after those rights accrued, and after the railroad company had earned the bonds, as conclusive evidence of the constitutional invalidity of the act of March 22, 1869, [the law authorizing the issue of the bonds] the judgment must be affirmed, [i. e., the law held unconstitutional and the bonds invalid.]
>
> * * *
>
> But all along through the reports of our decisions are to be found adjudications in which, upon the fullest consideration, it has been held to be the duty of the federal courts, in all cases within their jurisdiction depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the state at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court.

There is no warrant, therefore, for the contention that because the court applied this doctrine in the Marshall & Ilsley cases it held them to be bona fide

holders without notice. This is a principle of general jurisprudence applicable between all parties in such cases. It would have been just as applicable in those cases had the suit been brought against the towns by the Plainview Railroad Company.

It may be that the reason why the counsel for defendants in errror suggest that the United States Circuit Court held Marshall & Ilsley to be bona fide holders is that it quotes from the opinion of the court in case of City vs. Lamson, 9 Wal., 477, in which that expression (bona fide holder) is used.

I shall not trouble this Court with any argument to show that the quotation of that language has no significance. No narrow verbal criticism can create any doubt as to the court's meaning. The whole tenor of the court's opinion in Marshall & Ilsley's cases leaves no doubt as to the grounds on which the decision was based.

Thirdly.

The Supreme Court of Minnesota, in rendering the judgments brought here for review, disregarded the provision of the United States Constitution (Article I, Section X) that no state shall pass any law impairing the obligation of contracts.

Again it is necessary, in order to show that these cases actually involve the present federal inquiry, to

refer to the grounds of decision in the state court. Obviously, the very first point to be determined before plaintiff in error could be held liable for the Plainview Railroad Company's transfer of the bonds of the towns was that those bonds and the agreements of the towns under which the bonds were issued were originally invalid. If the bonds were valid in the hands of the Plainview Railroad Company, their transfer, whether to a bona fide holder or not, could not be either wrongful or hurtful. And so, at the outset, the court below necessarily and actually decided that the bonds were invalid. The point hitherto discussed as the first federal question in these cases formed the second part of the state court's decision; and only in consequence of the two together was plaintiff in error adjudged liable.

The position of the Minnesota Supreme Court concerning the validity of the bonds is stated in the following extract from its opinion:

> The question of the validity of these bonds was considered and determined in the case of Harrington vs. this plaintiff and the Plainview R. R. Co., 27 Minn. R., 228, adversely to the railroad company, and that decision must be accepted, without further discussion, as the law governing this case.
>
> The bonds were not issued upon the vote of the electors of the town in pursuance of Laws 1877, ch. 106, sec. 5, but in pursuance of sec. 7 of that act, upon a petition of a majority of the tax-payers. The proceedings to procure such bonds were initiated and prosecuted by the railway company under the act by filing with the town clerk its proposition in writing for the issuance to it of the bonds of the town, as provided by section 4, and thereafter in securing and filing the petition of the tax-payers, as directed by section 7.

Plainview Record, p. 180 ; Elgin Record, p. 158.

In explanation of the last paragraph of this quotation, we will refer this court to pp. 2-6 of the statement of facts preceding this brief, where the Minnesota statute under which the bonds were issued is fully set forth. The case of Harrington vs. Town of Plainview, the decision in which was simply followed in these cases, is the action referred to on p. 8, ante, of the statement of facts accompanying this brief. It is enough to say of the decision, at present, that it went upon the general ground that Section 7 of the general law permitting the issue of railway-aid bonds was violative of the Minnesota Constitution in that it left the question of granting bonds to the decision of resident tax-payers, instead of qualified voters.

Such being the actual decision and ground of decision in regard to the validity of the bonds of defendants in error, how is there presented a question under the constitutional prohibition of any impairment by a subsequent law of the obligation of a contract? The answer is that the state court, in consequence of its decision that the bonds were invalid, gave effect to the act of March 3d, 1881, (quoted on p. 12, ante,) and held that that act made plaintiff in error liable to the towns.

Two things are indisputable, and are sufficient to show the decision, both necessarily and actually, by the court below of the federal question now presented,—

1. Plaintiff in error could not be, and was not, held liable under the act of 1881 for any other reason than that the agreements of the towns under which the bonds were issued, and the bonds themselves, were declared invalid. That is, the decision below was that there was no valid contract between the towns and the Plainview Railroad Company, plaintiff's predecessor, and that therefore the act of 1881 should be given effect. This act, it must be remembered, did not purport to make plaintiff in error liable to the towns unless the Plainview Railroad company would have been. (See act, p. 12, ante; Plainview Record, p. 152.) The plaintiff in error is declared to take the franchises and property of its predecessor "subject to all demands, claims and rights of action against said Plainview Railroad Company arising or growing out of the latter company having heretofore obtained and disposed of" the bonds; and further it is said that plaintiff in error shall assume "all claims and demands against said Plainview Railroad Company." Plainly, if the Plainview Company had not itself been liable for its transfer of these bonds, the act does not purport to make plaintiff in error, as its successor, liable. The statute does not say that plaintiff in error must in any event, and as an unqualified condition of taking the franchises and property of the Plainview Railroad Company, pay the towns the amount of the bonds. On the contrary, if the bonds were valid, plaintiff in error was not properly to be affected with

any liability under the act of 1881, for in that case plaintiff's predecessor was not liable.

2. Also, even if the bonds were invalid and the Plainview Railroad Company liable for their transfer, yet this plaintiff in error was not itself subject to that liability except under the statute of 1881. It was this act, and it only, which charged plaintiff in error with its predecessor's liability to the towns; and this act was the only ground upon which the Minnesota Supreme Court actually put plaintiff in error's responsibility, saying,—

> The Winona & St. Peter R. R. is made defendant because it has purchased and succeeded to all the rights of the Plainview R. R. Co. in pursuance of Sp. Laws 1881, ch. 414, under which it was authorized to make such purchase, "subject to all demands, claims, and rights of action against said Plainview Co. arising out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview and Elgin to said Plainview R. R. Co." &c.
>
> The purchasing company acquired the property and franchises of the Plainview Co. by virtue of that act, and of course took the grant *cum onere* and subject to the provisions and conditions of the act.
>
> *Plainview Record, pp. 184—5; Elgin Record p. 163.*

It thus appears that the State Court in these cases gave effect to the statute of 1881 as imposing upon plaintiff in error a liability to the towns, and it gave the statute such effect because it decided the bonds of the towns, issued in 1878 and 1879, and the agreements under which they were issued, made

in 1878, invalid and having neither existence nor effect as contracts.

The question of impairment of the obligation of the town's contracts through the effect given by the court below in these cases to the act of 1881 exists none the less because the decision of the Minnesota Supreme Court was that the contract was void and therefore the subsequent statute to be given effect—rather than the converse, that because of the effect to be given the later statute the contract could not be upheld. It is not necessary, in order that a subsequent statute shall impair a previous contract's obligation, that the statute should itself be made the reason for declaring the contract invalid or for restricting the contract's full and proper operation. Even if, as here, the State Court declares the contract invalid on grounds independent of the later statute, still if the declared invalidity of the contract, though placed upon such independent or general grounds, is made the reason for giving the subsequent statute an effect which it could not have but for the contract's invalidity, the contract is impaired by the later act. The essential thing is only that the subsequent act be given an effect which it cannot properly have if the contract is valid. An inconsistency between the subsequent statute, as judicially given effect, and the rights growing out of the contract, correctly construed, makes a case of impairment of the obligation of the contract.

This court has often and clearly announced the law as stated.

Bridge Proprietors vs. Hoboken Co., 1 Wall, 116, 144—5.

Delmas vs. Merchants Ins. Co., 14 Wall. 661.

University vs. People, 99 U. S. 309.

Wright vs. Nagle, 101 U. S. 791, 793—4.

Louisville Gas Co. vs. Citizens Gas Co., 115 U. S. 683, 696—9.

Southwestern R. R. Co. vs. Wright, 116 U. S. 231.

Vicksburg &c. R. R. Co. vs. Dennis, 116 U. S. 665, 667.

Given vs. Wright, 117 U. S. 648.

Hoadley vs. San Francisco, 124 U. S. 639, 645.

New Orleans Waterworks vs. La. Sugar Co., 125 U. S. 18, 38.

The result of all the cases is that the federal question whether the obligation of a contract has been judicially allowed to be impaired by a subsequent statute is composite, and includes the two questions, (1) whether the asserted contract right exists, and (2) whether, if it does, the effect given to the statute interferes with that right. If the State Court upholds the statute against the asserted right, whether through a decision of one or the other question,

a case is made for writ of error to this court; and this court will determine for itself both branches of the general inquiry.

Nor is it material in these cases that the act of March 3rd, 1881, which plaintiff in error claims has been allowed to impair the contract with the towns, defendants in error, does not purport to have any effect unless there was, independently of it, an existing liability of the Plainview Railroad Company to the towns. This subsequent statute was *in fact* given the effect of making plaintiff in error liable to the towns in these actions. Upon the statute alone, as we have seen, the court below pronounced plaintiff in error under a liability, which but for the statute would not have fallen upon plaintiff in error, even if it had existed against the Plainview Railroad Company. And the statute was actually permitted and adjudged to operate to make plaintiff in error liable. If, however, the contracts of the towns were valid and plaintiff in error entitled to the benefit of them as valid contracts, the actual effect of the act of 1881, given to it by the judgments below, was inconsistent with the results of the contracts.

It is the effect actually given to a statute, subsequent to a contract and claimed to impair it, which determines whether, if the contract exists, the statute does in fact impair it. The statute as construed by the State Court, and with the operation there accorded it, is what this court looks at to decide whether a contract has had its obligation impaired.

The point hardly needs enforcement. If the statute were allowed no effect as judicially passed upon, there would of course be no possible impairment, whatever its terms. And, on the other hand, whatever its terms and proper construction, if through judicial construction the statute is allowed an effect inconsistent with contract rights of a party to the action, the statute then impairs that contract's obligation. This court has said:

> *As the construction which the Supreme Court of Missouri places upon certain legislation*, enacted after the charter of the St. Joseph & Iowa Railroad Company was granted, is inconsistent with the exemption claimed [under that statute] the controlling question on this writ of error is whether the local statutes, *as interpreted and applied by that court*, impair the obligation of any contract which the company had with the state and thereby deprive its successor, the plaintiff in error, of any rights secured by the constitution of the United States.
>
> *Chicago &c. R. R. Co. vs. Guffey, 120 U. S. 569, 570.*

This case was the common one of an attempt to tax, under general laws, property claimed by the owner to enjoy a special statutory exemption. Of such cases as a class it is true that it is through judicial construction of the general tax laws that the laws are, or are not, to be considered as purporting to apply to exempt property. If they are construed as so applying, the question of their validity *in that application* comes up; but otherwise there arises no question whether they can constitutionally operate, as they do not even purport to affect the property in question.

In another case this court spoke through Mr. Justice Miller as follows:

> It is said, however, that it is not the validity of the act of 1860 [claimed to be the impairing act] which is complained of by plaintiffs, but *the construction placed upon that act by the State Court.* If this construction is one which violates the plaintiffs' contract, and is the one in which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract unless it takes jurisdiction of such cases.
>
> *Bridge Proprietors vs. Hoboken Co., 1 Wall. 116, 144.*

We need not amplify the point. In these cases the Minnesota Supreme Court gave the act of March 3rd, 1881, the actual effect of making plaintiff in error liable to the defendants in error. If plaintiff in error is entitled to assert against the towns, by reason of its succession to the Plainview Railroad Company, the same rights and privileges against the towns as the latter company had in consequence of its contracts with the towns and the bonds issued by them, and if these contracts and bonds were valid, then the rights and privileges of plaintiff in error growing out of the contracts of the towns with the Plainview Railroad Company were violated by the effect given by the Minnesota Supreme Court in these cases to the act of March 3rd, 1881, and that act was allowed by the judgments below to impair the obligation of the towns' contracts.

The only question that remains, before it is shown

that the federal question now claimed really arises upon the records, is whether plaintiff in error is entitled to defend itself against these actions—as its predecessor, the Plainview Railroad Company, plainly would have been—by the rights of the Plainview Railroad Company and the duties of the towns created by the contracts between those parties, whether preliminary to the actual issue of the bonds or contained in the bonds themselves. Of course it is to be assumed here that the contracts and bonds of the towns are valid; and it is simply to be inquired whether plaintiff in error can claim to be entitled to the benefit of those contracts and bonds, if valid. In other words, can plaintiff in error say that it is, as the Plainview Railroad Company would have been before plaintiff in error's acquisition of its franchises and property, entitled to the protection furnished by the contracts of the towns to issue the bonds and by the bonds themselves, if valid? Is the plaintiff in error the successor of the Plainview Railroad Company in reference to the obligation of the latter company's contracts with the towns, defendants in error?

In each of three ways plaintiff in error succeeded to the obligation of the towns' contracts, viz:

1. Plaintiff in error is the successor, and took the place, of the Plainview Railroad Company in its corporate capacity.

2. Plaintiff in error received from the Plainview Railroad Company by express grant the latter company's contract rights against the towns.

3. The act of March 3rd, 1881, even if it did not put plaintiff in error in the Plainview Railroad Company's place as a corporation, did make plaintiff in error the latter company's successor in relation to the contracts and bonds of these towns.

Of these different methods of succession, it will be enough to speak as follows:

1. This act of March 3rd, 1881, authorized a sale of "the property and franchises" of the Plainview Railroad Company to plaintiff in error; and under it, by the deed between those companies set out fully on pp. 153 and 154 of Plainview Record and pp. 134 and 135 of Elgin Record, there were conveyed, with the unanimous consent of the stockholders of both parties, not only all the property of the Plainview Railroad Company, but also *all its "franchises, including the franchise to be a corpocation."* By virtue of the statute and the deed the plaintiff in error became the successor of the Plainview Railroad Company as a corporation.

The courts of Minnesota construe such a statute as the one here in question as including in the word "franchises" the franchise to be a corporation. So it was decided in a case as prominent in the history of the state, and as often followed, as any in the Minnesota Reports.

First Division of St. Paul & Pacific R. R. Co. vs. Parcher, 14 Minn. 297, 303.

Under the authority of this decision, made in

1869, a number of the principal railroads in Minnesota hold franchises and rights now undisputed. Among the many cases following the pioneer are:

State vs. Winona & St. Peter Railroad Company, 21 Minn. 315.

Minnesota Central Railway Company vs. Melvin, 21 Minn. 339.

City of St. Paul vs. St. Paul & Sioux City Railroad Company, 23 Minn. 469.

State vs. Northern Pacific Railroad Company, 32 Minn. 294.

County of Stevens vs. St. Paul, Minneapolis & Manitoba Ry. Co., 36 Minn. 467.

These cases will illustrate the importance and publicity of the Parcher decision in Minnesota's history. The point of it, as appliable to these cases, is given in the following quotation from p. 303 of the opinion:

> What did the state acquire by virtue of the foreclosure? The security required by the amendment to the constitution, and which is alleged in the complaint to have been given by the Minnesota and Pacific Railroad Company, was a certain amount of the company's bonds secured by a first mortgage upon its "roads, lands and franchises." This language will bear but one construction, and that is that the mortgage required and given was a first mortgage upon *all* the roads, *all* the lands, and *all* the franchises of the company. This included the corporate franchise, or the right to be a corporation.

The same construction was put upon the language in

Welsh vs. First Division St. Paul and Pacific Railroad Company, 25 Minn. 314.

And such has continuously been the local rule of statutory construction. After such construction had been followed for twelve years, and in view of it, this act of March 3rd, 1881, was passed, authorizing plaintiff in error to acquire "the franchises and property" of the Plainview Railroad Company. This unmistakably, in a Minnesota statute, includes the franchise to be a corporation; and so, therefore, the deed of conveyance expressly included it.

It is unimportant whether the statute and transfer wrought what is to be called a "succession" or a "consolidation" of corporations. Plainly the Plainview Railroad Company was merged in the plaintiff in error. An example of such merger of one corporation in another, whether pre-existing or then formed, is found in the case of

Central Railroad and Banking Co. vs. Georgia, 92 U. S. 665.

In this case, as in that, the union was effected under the name and charter of one of the companies, rather than by formation of a third, new, company. But, none the less, there is a case of succession. Plaintiff in error came into the place of the Plainview Railroad Company, and is its successor in personality. Therefore plaintiff in error is privy to the contracts of its predecessors with defendants in error; and, just as much as its predecessor would

have been, is entitled to insist, and rely, upon the obligation of those contracts.

2. Plaintiff in error also became privy to the obligation of the contracts with the towns through the Plainview Railroad Company's deed conveying to it all the property and effects of the latter company. Aside from the question of succession to the Plainview Railroad Company's corporate existence, plaintiff in error certainly succeeded to all its rights and privileges.

It is proper, also, here to inquire in what way the defense of the Plainview Railroad Company, if that company had been sued by the towns before plaintiff in error had been put in its place, would have depended upon the obligations of the towns' contracts. And first it should be noted that the bonds themselves did not constitute the only contracts of the towns. Before their issue there were completed contracts with the Plainview Railroad Company to issue them. These antecedent contracts were formed by the proposition of the company to the towns, for construction of the road in consideration of bonds, and by its acceptance by the towns. The acceptance was complete, and the contracts perfected, when the proper petition of resident tax-payers, praying the proposition's acceptance, was filed in the office of the town clerk. The court will so see from the nature of the statute, Ch. 106 of Laws of

1877, as quoted in the statement of facts on pp. 3—6 supra. At the end of section 7 it is expressly said that "*then* [i. e., upon the filing of the petition] *such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company shall be deemed to have been arrived at and perfected.*" The same thing is also shown by sections 1, 2, 3 and 6 of the statutes; and counsel for defendants in error admit it, when they say, on p. 25 of their brief, that

> The contract in question was consummated and closed by the proposition, acceptance and construction of the railroad.

The contract was, surely, made before the construction of the railroad, but whether acceptance, or acceptance and construction, fixed the agreement is immaterial. The important thing is that before the issue of the bonds there existed a complete executory contract for their issue. If the language of the statute needed the support of judicial decision, it would be supplied by

> *State vs. Town of Lime, 23 Minn. 521, 526—7.*
>
> *County vs. Savings Bank, 92 U. S. 631.*
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> *Nugent vs. The Supervisors, 19 Wall. 241, 247.*

The bonds were issued in performance of the antecedent executory contracts; and afterward the bonds were transferred by the Plainview Railroad Company. Did these facts end the obligation of the

contracts, both antecedent and from the bonds themselves, so that the Plainview Railroad Company's own ground of defense, if the agreements and bonds were valid, would not have rested upon such obligation? Most certainly not; and if not, the still-existing rights of the Plainview Company through the obligation of the contracts passed on to plaintiff in error.

A contract, though executed, is still protected by the constitution against impairment. The issue of the bonds of these towns performed the contracts for their issue, but did not extinguish those contracts. And such antecedent contracts plainly did not go to the transferees of the bonds. Therefore they passed to the plaintiff in error. Indeed, it seems pretty certain that the transfer of the bonds did not terminate all the Plainview Railroad Company's rights growing out of their issue independently of the antecedent contracts. In the bonds themselves there was certainly involved an agreement on the part of the towns that they should be the property of the Plainview Railroad Company, and also that the company should have the right to dispose of them. The obligation of these, or similar, agreements accompanying and growing out of the issue of the bonds remained with the Plainview Company even after a transfer of the bonds; and, if so, came to the plaintiff in error.

It is not necessary, and it is not attempted, to analyze exactly and fully the rights of the Plainview

Company after the issue and transfer of the bonds. Plainly they were such, and they so arose from the contracts of the towns, whether before or accompanying the issue of the bonds, that they were a part of the obligation of the towns' contracts and within the constitutional protection. The language of Chief Justice Marshall, in *Fletcher vs. Peck, 6 Cranch., 87*, on pp. 136-7, may fitly be quoted here:

> *The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.*

3. Further, the act of March 3rd, 1881, by its own operation as a law, puts plaintiff in error in the place of the Plainview Railroad Company in respect to the latter's liability to these towns, and entitles plaintiff in error to the rights of the Plainview Company in respect to the bond transactions. This law cast any liability of the Plainview Railroad Company upon plaintiff in error; but it did not make plaintiff in error liable unless the Plainview Company itself had been. That is, this act of 1881 by its force as law, which defendants in error (when they claim a liability under it) certainly cannot question, gives plaintiff in error the benefit of the Plainview Company's rights against the towns. If plaintiff in error is not made liable under the statute unless the

Plainview Company was liable, then necessarily in actions brought by the towns to claim a liability by reason of the statute the plaintiff in error is allowed, through force of the statute, the benefit of the obligation of the Plainview Company's contracts with the towns. The act of March 3rd, 1881—operating as a law against the Plainview Company, plaintiff in error and the towns alike—puts plaintiff in error in respect to litigation concerning these bond transactions in the place of the Plainview Railroad Company.

As a final result, therefore, of the preceding consideration of the second Federal question claimed in these cases, it is most respectfully submitted that the records call upon this court to decide whether the State Court has not allowed the obligation of the contracts with defendants in error to be impaired in violation of the Federal constitution. The obligation of those contracts has been impaired, if the contracts were valid. With reference to the merits of that question, as presented by the motion for affirmance, it would hardly be justifiable before final hearing to do more than refer again to the many cases cited on pp. 18—20, ante, of this brief. Counsel believes that the validity of such a conditional law as Section 7, Ch. 106, of the laws of 1877, is not only sustained by an immense number of authorities, but is not even opposed by a single decision except that in *Harrington vs. Plainview, 27 Minn. 224*; and

that even the Supreme Court of Minnesota had previously declared such laws valid in the cases cited on p. 20, ante.

One other point, raised concerning the merits by the brief for defendants in error [p. 27], requires brief attention. It is asserted that the decision in the case of Harrington vs. Town of Plainview is an estoppel concerning the validity of the bonds in the present action by that town. The answers are several:

1. No judgment was ever entered for plaintiff in Harrington vs. Plainview in the trial court (the District Court for Wabasha County.) The only judgment entered in that action in favor of plaintiff was the judgment of the trial court appealed from by Harrington. This judgment of reversal will be found in *Plainview Record, p. 82.* It directed judgment for plaintiff in the court below, but such judgment was not entered. The records in these cases contain both the Harrington record in the Supreme Court, and the record of that case in the District Court.

Plainview Record, pp. 64—92; 92 and 93; 115—118.

No judgment was in any way proved to have been entered in the trial court; and not only so, but it was affirmatively proved that a judgment had not been entered.

See Testimony of Charles J. Stauff, Clerk of the District Court for Wabasha County, in Plainview Record, p. 53.

Consequently there was no judgment entered in the Harrington case which can be made the basis of a claim of estoppel.

2 Wharton on Evidence, Sec. 781.
Smith vs. McCool, 16 Wall., 560.
Schurmeier vs. Johnson, 10 Minn., 319.
Estate of Holbert, 57 Cal., 257.

2. Also, the estoppel is claimed between the Town of Plainview and the Plainview Railroad Company, and then against plaintiff in error as the latter's successor. But, the town and the Plainview Company were both defendants in the Harrington case, and in no way or sense adversary parties. Between them there was no controversy, and the relief sought by Harrington was an injunction against the town's giving, and the company's receiving, the bonds.

3. The subject matter of the Harrington action was the validity of the bonds. Those bonds were transferred before the case was argued or decided in the State Supreme Court; and this plaintiff in error never claimed or succeeded to any interest in any of them. If these present suits are to be sustained against plaintiff in error, it must be through evidence competent against it.